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FILED
DEC 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT R. HORTON, SSN: 441-64-6645,	)	
Plaintiff,	)	
v.	)	**Case No. 98-CV-0830-B (E)**
KENNETH S. APFEL, Commissioner, Social Security Administration,	)	
Defendant.	)	

ENTERED ON DOCKET
DATE DEC 29 1999

ORDER

On November 1, 1999, United States Magistrate Judge Claire V. Eagan entered a Report and Recommendation for this case. No objection has been filed to the Report and Recommendation and the ten-day time limit of Fed. R. Civ. P. 72(b) has run. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify or reject the findings and recommendations therein. The decision of the Commissioner denying disability benefits to claimant is affirmed.

IT IS SO ORDERED this 28th day of December, 1999.

THOMAS R. BRETT,
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT R. HORTON,
SSN: 441-64-6645,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0830-B (E)

ENTERED ON DOCKET
DATE DEC 29 1999

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to plaintiff has been entered. Judgment for the defendant and against the plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 28th day of December, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Plaintiff,

vs.

DETRICK REALTY, INC., d/b/a PRUDENTIAL/ DETRICK REALTY,

Defendant.

Case No. 98-C-507-E

ENTERED ON DOCKET
DATE DEC 29 1999

ORDER

Now before the Court is the Motion for Judgment Notwithstanding the Verdict (Docket #48) of the Plaintiff, The Travelers Indemnity Company of Connecticut (Travelers) and the Motion for Attorney Fees and Prejudgment and Postjudgment Interest (Docket # 51) of the Defendant, Detrick Realty, Inc., d/b/a Prudential/Detrick Realty (Detrick).

This is a declaratory judgment action regarding coverage on a real estate errors and omissions policy, and a claim for bad faith, was tried to a jury in July, 1999. The jury returned a verdict in favor of Detrick on Travelers' claim for reimbursement and in favor of Detrick on its counterclaims for reimbursement and bad faith in the amount of $23,180.20. Travelers now seeks judgment notwithstanding the verdict on the bad faith clam.

Travelers issued a real estate errors and omissions policy to Detrick for the time period of May of 1995 through May of 1998. On February 15, 1996, Cecilia Saliba filed a lawsuit against Detrick Realty and its agent, June Reavis, in Creek County, alleging fraud, breach of fiduciary duty, and misrepresentation on the part of Detrick and Reavis. C. Michael Copeland entered an

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appearance and filed an answer on behalf of Prudential on April 8, 1996.

On April 21, 1998, Copeland sent a letter of evaluation to Brad Smolkin of Travelers, stating that discovery was complete, that he concurred in plaintiff's request for a non-jury trial, and that he recommended that a settlement offer be made in the amount of $5,000.00. On April 30, 1998, in a telephone conversation between Smolkin and Copeland, Smolkin informed Copeland that he did not have a file for the Saliba case, nor could he find a claimant named Saliba on Travelers' computer. At that time, however, he authorized a $5,000.00 settlement offer. When that offer was rejected, the case proceeded to trial on May 11, 1998, and Saliba was awarded $58,815.00 in damages, with the judge finding that no intentional fraud had been committed, but that defendants had breached a fiduciary duty owed to Saliba regarding the potential sale of her home.

In a telephone conversation between Smolkin and Copeland on May 19, 1998, Smolkin stated that the late notice to Travelers' raised the possibility of coverage defenses, but admitted that, at that time, he did not know how the case would have been handled differently had Travelers' been involved earlier. On June 3, 1998, Smolkin sent Mr. Sheldon Detrick, Detrick's Chief Executive Officer, a "reservation of rights" letter, stating that because Smolkin was not aware of the lawsuit until the phone conversation of April 30, 1998, Travelers was not obligated to pay any portion of the judgment pursuant to the notice provision that, in the event of a claim, the insured must:

> 1. Immediately record the specifics of the "claim" or "suit and the date received; and
> 2. Notify [Travelers] immediately.
>
> [The insured] must see to it that [Travelers] receive[s] written notice of the "claim" or "suit" as soon as practicable and within the policy period or within 60 days after its expiration or termination. This section provides that the insured must immediately send copies of any demands, notices, summonses or legal papers received in connection with the "claim" or "suit."

Travelers then brought this action seeking a declaratory judgment that it was not liable under its policy for coverage or indemnification with respect to the judgment in the Saliba case, and that it is not liable to reimburse Detrick for its cost of defense in the Saliba case. Detrick answered, claiming that Travelers had not been prejudiced by the late notice and that it had waived the defense provided by that policy provision by authorizing the settlement and proceeding to trial. Detrick also filed a counterclaim for bad faith. The case was resolved by a jury in Detrick's favor. Travelers now argues that the evidence does not support the jury's verdict on the issue of bad faith.

Legal Analysis

I. Standard for Judgment Notwithstanding the Verdict

The standard under which a Court may disregard a jury determination is set forth in Fed.R.Civ.P. 50(a), and is based on a finding of "no legally sufficient basis for a reasonable jury to find for that party on that issue." That standard has been interpreted as requiring "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." United States v. Real Prop. Known as 77 East 3rd St., N.Y., 869 F. Supp 1042, 1056 (S.D. N.Y. 1994).

II. Bad Faith Claim

In support of its motion for judgment notwithstanding the verdict on the bad faith claim, Travelers argues that the evidence demonstrated a legitimate dispute regarding coverage, which precludes, under Oklahoma law, a finding of bad faith, and that there was no evidence to demonstrate that Travelers acted in reckless disregard of Detrick's rights. The entirety of Travelers' argument that its actions were reasonable is based on the testimony that Travelers received notice of the claim in a misleading way because the notice was captioned "status report," and that

Smolkin's actions, upon receiving notice of the claim, were reasonable. Detrick argues that it is not Smolkin's actions at the time of receipt of the "status report" that are in question, but that his actions, once an adverse verdict was returned, demonstrate bad faith. [1] The Court agrees with Detrick that the evidence was sufficient for the jury to conclude that Travelers' conduct in denying coverage after a verdict was returned in the Saliba case was unreasonable, and based on the economics of a larger than expected verdict. This is particularly true in light of the prejudice requirement to a defense of untimely notice, and evidence that Smolkin would not have handled anything differently has Travelers been provided with earlier notice.[2] Travelers' Motion for Judgment Notwithstanding the Verdict is Denied.

III. Attorney Fees and Costs

Detrick seeks attorney's fees in the total amount of $47,292.50, plus an enhancement of attorney's fees equal to 25% of the lodestar amount, prejudgment interest in the amount of $2,648.26, and postjudgment interest at the statutory rate of 15% from the date the judgment was returned in open court until paid. Travelers argues that, in its discretion the Court should decline to award attorney's fees, or that, in the alternative an enhancement is inappropriate and the lodestar amount should be reduced so that it bears a rational relationship to the verdict in the amount of

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[1] Travelers seems to argue, relying on Willis v. Midland Risk Insurance Co., 42 F.3d 607, 612 (10th Cir. 1994) and Buzzard v. Farmers Insurance Co., 824 P.2d 1105,1109 (Okla. 1991), that the Court cannot consider Smolkin's actions after the Saliba verdict was returned because the "relevant time period is the point in time at which the insurers performance was requested." The Court does not accept this restrictive interpretation of Oklahoma caselaw. Travelers was being requested to pay a judgment after the Saliba verdict was returned, and Travelers' actions connected to this request can certainly be the focus of a bad faith analysis.

[2] Although Smolkin testified to the contrary at trial, this is apparently not what the jury chose to believe.

$23,180.20. Travelers does not object to the requests for prejudgment and postjudgment interest.

Travelers' first argument is that an award of attorney fees under Okla. Stat. tit. 36, §3629(B) is discretionary, and that the Court, in its discretion should deny Detrick's request for fees. Okla. Stat. tit. 36, §3629(B) provides in pertinent part: "Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party." This statute has been interpreted in two ways. In Adair State Bank v. American Cas.Co.of Reading, 949 F.2d 1067 (10th Cir. 1991), the Tenth Circuit found that the word "allowable" was intended to lodge discretion with the trial judge on the issue of whether to award fees. In Williams v. Old American Ins. Co., 907 P.2d 1105 (Okla. Ct. App. 1995) and Shadoan v. Liberty Mutual Fire Ins. Co., 894 P.2d 1140 (Okla. Ct. App. 1994), the Oklahoma Court of Appeals found that an award of attorney fees under the statute was mandatory doe to the use of the word "shall." This Court finds it unnecessary to resolve the issue. Even assuming that an award is discretionary, the Court finds that an award of attorney fees is appropriate in this case. A jury found that Detrick, under the terms of the policy and the circumstances in this case was entitled to coverage for the Saliba lawsuit. To fail to award a reasonable attorney fee would deprive Detrick of the benefit of its bargain in purchasing the errors and omissions policy. The Court specifically finds that the facts that Detrick is a corporation capable of bearing its own fees, and that Detrick added a bad faith claim to the lawsuit do not warrant a denial of the request for fees. Detrick is entitled to a reasonable attorney fee pursuant to Okla. Stat. tit. 36, §3629(B).

Travelers, however, raises a question as to whether the requested fee of $47,292.50 represents a "reasonable attorney fee," and requests that the Court reduce the fee award so that the attorney fee would "bear a rational relationship to the amount recovered." In this argument, Travelers apparently is not arguing that the requested rate or the time spent are unreasonable. Travelers' argument,

essentially, is that a $47,000 fee is excessive in light of a verdict in the amount of $23,180,20. While Travelers is able to support its argument with caselaw, wherein fee requests were reduced in light of modest verdicts, Southwestern Bell Telephone Co. v. Parker Pest Control, Inc., 737 P.2d 1186 (Okla. 1987), and Hall v. Globe Life and Accident Insurance, 968 Pl2d 1260 (Okla. Ct. App. 1998), there is also authority for the proposition that an award of attorney fees in excess of the amount of the verdict can be proper in certain circumstances. See Taylor v. State Farm Fire and Casualty Co., 981 P.2d 1253 (Okla. 1999), Taylor v. State Farm Fire and Casualty Co., 182 F.3d 933, 1999 WL 380837 (10th Cir. 1999). Moreover, the Court agrees with Detrick's analysis that, in light of what Travelers' was attempting to recover, and addition to what Detrick did recover, the amount in controversy exceeded $50,000. Lastly, the Court agrees that Hall is distinguishable. In Hall, the requested fee was reduced by two-thirds based on Hall's arguably inflated evaluation of her case, the relatively modest amount recovered, and the fact that the issue of punitive damages was not submitted to the jury. Hall, 968 P.2d, at p. 1261.

Nonetheless, the Court must, under the teaching of Southwestern Bell and Hall, look at the requested fee in light of the total recovery, and determine whether that amount is reasonable. Here, the Court notes that little time was spent on discovery, that most time billed for was spent either on briefing the cross- motions for summary judgment, preparing for trial, or trying the case. The Court also notes that the verdict in favor of Detrick has a value of approximately $50,000 in light of what it received plus what it did not have to pay back to Travelers. Nonetheless, the Court is uncomfortable with a fee award that is approximately equal to the value of the judgment and finds that a reduction of $15,000 is appropriate, making the fee award $32,292.50.

Detrick requests a twenty-five percent enhancement of its fee to which Travelers' objects.

Detrick argues that an enhancement is supported by the reasoning of the Court in Oliver's Sports Center v. National Standard Insurance, 615 Pl.2d 291, 294 (Okla. 1980), wherein the court recognized that a fee award may be enhanced by the risk of non-recovery. Detrick also argues that other factors considered by the Court in Oliver's Sports Center support a fee enhancement. Detrick argues that the facts that representation of Detrick realty precluded Detrick Realty's counsel from accepting other cases, that the case was tried with a minimal amount of formal discovery, that the results obtained in the case were significant all weigh in favor of an enhancement. Even considering each of these factors, in light of the verdict obtained and the attorney fee awarded, the Court does not consider an enhancement to be appropriate.

Travelers' Motion for Judgment Notwithstanding the Verdict (Docket # 48) is denied. Detrick's Motion for Attorney Fees and Prejudgment and Postjudgment Interest (Docket #51) is granted in the amount of $32,292.50, plus prejudgment interest in the amount of $2,648.26 and postjudgment interest at the rate of 5.670% per anum. Defendant's Motion to Settle Journal Entry of Judgment (Docket # 57) is denied as moot. The parties are directed to submit a Journal Entry of Judgment consistent with the terms of this Order within 10 days of the date of the Order.

IT IS SO ORDERED THIS 28th DAY OF DECEMBER, 1999.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED
DEC 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARTHUR D. DAVIS,
SSN: 545-68-5511,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,[1]

Defendant.

Case No. 97-CV-0986-EA

ENTERED ON DOCKET
DATE DEC 29 1999

ORDER

Claimant, Arthur D. Davis, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[2] In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

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1 Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2 On March 8, 1993, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially (April 29, 1993), and on reconsideration (June 28, 1993). A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held April 29, 1994, in Miami, Oklahoma. By decision dated March 6, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On September 2, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy . . . ." Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.[3]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported

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[3] Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant -- taking into account his age, education, work experience, and RFC -- can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

II. CLAIMANT'S BACKGROUND

Claimant was born on March 3, 1943, and was 51 years old at the time of the administrative hearing in this matter (52 at time of ALJ's decision). He has a high school education and some additional course work at a Bible college and a junior college. Claimant has worked as a minister, a janitor, and a dairy cow milker. Claimant alleges an inability to work beginning November 29, 1992, due to depression with anxiety, cardiac dysrhythmia, chronic headaches, post-traumatic migraine, pseudodementia secondary to the depression and anxiety, and cervical spondylosis. The ALJ and the Commissioner characterize claimant's problems as heart palpitations, chest pain, shortness of breath, joint pain, and some mental problems, including nervousness, poor memory and difficulty with concentration. (R. 16; Def. Br., Dkt. # 16, at 1.)

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of light work, except that claimant was limited to low stress jobs. (R. 22) The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. Thus, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

IV. REVIEW

Claimant asserts as error that (1) the ALJ did not have good cause for rejecting the opinion of plaintiff's treating physician; and (2) the ALJ's finding and decision that the plaintiff does not have an impairment which meets or equals a listed impairment is not supported by substantial evidence. In connection with both of these assertions, claimant argues that his mental impairments preclude a finding that he has the RFC to perform light work.

A. Evaluating Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. §§ 404.1520a, 416.920a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach

it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ followed this procedure, but his determination of the presence or absence of certain medical findings pertaining to claimant's ability to work was deficient and the basis of the ALJ's conclusions expressed on the PRT form is invalid.

1. Step Three Analysis

As claimant points out, the ALJ glossed over step three of the sequential evaluation process. The regulations provide that a claimant's impairment must meet, medically equal, or functionally equal in severity the set of criteria for an impairment listed in the Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1, to be found disabled at step three. See 20 C.F.R. §§ 404.1520(d), 416.920(d). At that step, an ALJ is "required to discuss the evidence and explain why he found that [claimant] was not disabled" in his written decision. Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). As in Clifton, the ALJ here "did not discuss the evidence or his reasons for determining that [claimant] was not disabled at step three, or even identify the relevant Listing or Listings; he merely stated a summary conclusion that [claimant's] impairment did not meet or equal any Listed Impairment." Id.

> The Administrative Law Judge is convinced that the claimant is severely impaired by premature ventricular contractions and mental problem [sic], including depression and anxiety; however, the claimant does not have an impairment or combination of impairments listed in, or medically equal to an impairment listed in Appendix 1, Subpart P, Regulations No. 4.

(R. 16) He reiterated that statement later in the "Findings" section of his decision (R. 21)

A claimant bears the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Claimant argues that the ALJ should have considered whether claimant met Listing 12.04 (Affective Disorders) or Listing 12.06 (Anxiety Related Disorders) based on the reports of his treating physician, Kayla Lakin-Brewer, D.O. The ALJ did analyze claimant's mental impairments on the PRT form in light of these two listings (see R. 24-27), but he does not mention them in the text of his decision. He also discusses Dr. Lakin-Brewer's RFC assessment, other evidence, and his reasons for determining that claimant was not disabled at steps four and five, and these findings could be relevant, in some respects, to a step three analysis. Nonetheless, at step three the ALJ's "bare conclusion is beyond meaningful judicial review." Clifton, 79 F.3d at 1009.

2. Mental Assessment Form

The ALJ's evaluation of claimant's mental impairment is also flawed because of an invalid basis for the conclusions on the PRT form completed by the ALJ. Although the ALJ does not mention the PRT form in the body of his decision, he does cite to the findings of the consultative psychiatric examiner, Donald R. Inbody, M.D. in support of his conclusions. (R. 17)

> On mental status examination this is a tall, pleasant male who behaved in a pleasant and somewhat jovial manner during the interview. He tended to be somewhat of a poor historian, and had a tendency to ramble, but could easily be brought back to the central subject. His speech basically was logical, coherent and sequential with no affective disturbances or associational defects in thinking. No psychotic symptomatology was noted. He was oriented in all spheres and appears to be of average intelligence. He showed no signs of clinical anxiety during the interview, but states that he does become anxious easily. He showed no evidence today of clinical depression and denies any suicidal ideation. Sleep pattern has been referred to above, and appetite is normal. There are no disturbances in recent and remote memory and his fund of general information is good as were mathematical computations, similarities and proverbs. There were no disturbances in attention and concentration and judgement is felt to be intact. He showed no impairment in reasoning or ability to make occupational or social adjustments.

(R. 211) Dr. Inbody diagnosed claimant as having "[d]epression not otherwise specified, moderate, currently being treated" and "[g]eneralized anxiety reaction, chronic, currently being treated." (Id.) The ALJ's findings on the PRT form mirror Dr. Inbody's diagnosis. (R. 25-26) Dr. Inbody also noted that claimant had "cardiac dysrhythmia, etiology unknown," "history of headaches, etiology unknown," and "cervical spondylitis by history." (R. 212) He deemed claimant's psychosocial stressors as moderate, and he rated claimant's global assessment of functioning (GAF) at 60, with the highest GAF in the past year at 65.[4] (Id.)

Unfortunately, Dr. Inbody also completed a medical assessment capacity form which has been sharply criticized by the Tenth Circuit because such forms do not match the requirements of the regulations regarding the evaluation of mental disorders (20 C.F.R. Pt. 404, Subpt. P, App.1, § 12.00 *et seq.*) or the PRT form. "Not only do they hamper our review, but they hamper an ALJ's review as well." Cruse, 49 F.3d at 618; see also Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). The form completed by Dr. Inbody indicates that claimant had only a "fair" ability to deal with the public, deal with work stresses, function independently, maintain attention/concentration; to understand, remember, and carry out complex job instructions or detailed, but not complex, job instructions; and to demonstrate reliability. (R. 213-14) The form defines the term "fair" as meaning that claimant's "ability to function in this area is seriously limited, but not precluded." (R. 213) The

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[4] GAF scores indicate psychological, social and occupational functioning along a hypothetical continuum of mental health -- illness. A score of 51-60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning, and a score of 61-70 indicates some mild symptoms or some difficulty in social, occupational, or school functioning, but generally functioning pretty well, with some meaningful interpersonal relationships. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed.1994).

Tenth Circuit expressly held that the term "fair" as used on the form is evidence of disability. Cruse, 49 F.3d at 618.

The consultative examiner's findings are internally inconsistent. Thus, they fail to provide adequate support for the ALJ's conclusions regarding claimant's mental impairments. The ALJ's failure to discuss the evidence or his reasons for determining that claimant was not disabled at step three likewise taint his evaluation of claimant's mental impairments.

B. Treating Physician

Dr. Lakin-Brewer was claimant's treating physician. (R. 200)[5] Contrary to the ALJ's assertion, Dr. Lakin-Brewer's medical opinion is not entirely consistent with his finding that claimant can perform light work activity. (R. 17) Dr. Lakin-Brewer's opinion indicates that claimant can perform the physical requirements of light work, but repeated movement increases his chest pain. (R. 207-08) Claimant was hospitalized in November 1992 and twice in 1993 for chest pains, and he received emergency room treatment three times, once in 1994 and twice in 1995, for chest pains. Although extensive tests have revealed no evidence of coronary disease, there is no dispute that claimant has frequent premature ventricular contractions (PVCs).

The ALJ stated that "the most recent records show continued problems with PVCs; however, the most recent records show he was having no more than "occasional" PVCs and that his chest pain was improved." (R. 17) The exhibits to which the ALJ referred were not the most recent, but were from 1992 and 1993. Those exhibits are filled with references to claimant's claims that he often became dizzy, weak, light headed, and short of breath; he had stabbing pains in his chest (R. 181,

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[5] It appears that a doctor with whom Dr. Lakin-Brewer is professionally affiliated, F. Rollin Bland, M.D., also treated claimant for removal of claimant's gallbladder in 1994.

191); he fainted; he took nitroglycerin; he was diaphoretic (perspired profusely) (R. 183, 184, 192, 193); he had "spells nearly every day" (R. 186, 194); he had steady pains in his chest; and the "occasional" PVCs to which the ALJ referred may have come from the notation "H - occ PVC but essentially regular." (R. 189)

Although these notes also reference intermittent improvement or relief, the improvement and relief did not endure. The ALJ does not reference the notes from claimant's emergency room visits after 1993 which indicate that he continued to complain of chest pain, headaches, syncopal episodes, PVCs, dizziness, weak spells, hot flashes, anxiety, and depression. (R.383, 391, 393) These records were submitted by claimant after the ALJ's decision, but before the determination by the Appeals Council. The Appeals Council concluded that the additional evidence did not provide a basis for changing the ALJ's decision. (R. 5)

Dr. Lakin-Brewer opined that claimant "has extreme depression with impaired concentration, extreme anxiety with panic attacks which worsens the chest pain, cardiac dysrhythmia, and headaches." (R. 205) She also opined that claimant's depression "affects ability to comprehend, relate to others, [and] understand commands." (R. 206) She rated the degree of impairment in his ability to relate to other people and the degree of constriction of claimant's interests as "moderately severe." (R. 204) She rated the degree of limitation in his ability to comprehend and follow instructions, to perform complex or varied tasks as "severe." (R. 204-05) She prescribed medication for claimant's panic attacks, depression, and anxiety. (R. 206)

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20

C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. §§ 404.1527(d)(2), 416.927(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. §§ 404.1527(e)(2), 416.927(e)(2).

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted.) A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

The ALJ summarized the medical evidence before him, claimant's testimony, and the assessments of Dr. Lakin-Brewer and Dr. Inbody as support for his finding that "the severity of the claimant's depression and anxiety is no more than mild to moderate in degree, but limits claimant to low stress jobs." (R. 19) However, the ALJ discounted Dr. Lakin-Brewer's opinion because he deemed her findings inconsistent with those of Dr. Inbody, and because she did not refer claimant for psychiatric treatment or psychological counseling. (R. 19) The ALJ dismissed the findings of both Dr. Lakin-Brewer and Dr. Inbody "to the extent they show the claimant has restrictions beyond low stress jobs." (Id.)

Dr. Lakin-Brewer is not a psychiatrist or a psychologist. Her specialties include general practice, obstetrics and gynecology, and she describes her type of practice as "direct patient care." (R. 195) As the ALJ noted, there is no evidence in the record that she referred claimant for psychiatric treatment or psychological counseling for his complaints. Dr. Lakin-Brewer's opinion is not supported by clinical or laboratory diagnostic testing. It is also brief and conclusory. However, there is some support for her opinion in the medical evidence submitted to the Appeals Council after the ALJ's decision, and her opinion is not necessarily inconsistent with other substantial evidence in the record. It is not inconsistent with the findings of Dr. Inbody as expressed on the mental assessment form completed by Dr. Inbody (although it is inconsistent with the findings expressed in the text of Dr. Inbody's report). The text of Dr. Inbody's report in some respects supports a finding that claimant's impairment does not meet a Listing at step three, but the ALJ fails to discuss the report of any doctor in connection with his determination that claimant's impairment does not meet a Listing. Accordingly, the ALJ has not shown good cause for rejecting the report of the treating physician; nor has he set forth legitimate reasons for disregarding it.

V. CONCLUSION

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. The decision is **REVERSED AND REMANDED**.

DATED this 29th day of December, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM SCOTT SOURS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 97-CV-0581-BU (E)**
	)	
COUNTY OF OTTAWA, et al.,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE DEC 29 1999

REPORT AND RECOMMENDATION

Plaintiff, a prisoner appearing *pro se*, submitted a civil rights complaint pursuant to 42 U.S.C. § 1983[1] (Docket #1). He filed an amended complaint on June 2, 1999 (Docket # 57). Plaintiff alleges that the defendants, acting under color of state law, subjected him to an illegal search and seizure in violation of the Fourth Amendment, and that they also violated his rights under the Fifth, Eight, and Fourteenth Amendments of the United States Constitution by filing false charges, falsely imprisoning him, maliciously prosecuting him and conspiring to invent probable cause. Defendants include the Ottawa County Board of County Commissioners ("BOCC"), Sheriff Jack Harkins, Deputy Sheriffs John Daniels and Sean Corbit, former District Attorney Ben Loring, and former Assistant District Attorneys William Culver and Douglas S. Pewitt. Plaintiff is suing the BOCC in its official capacity, Harkins and Loring in their individual and official capacities, and Daniels, Corbit, Culver,

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1 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

and Pewitt in their individual capacities. Plaintiff seeks declaratory judgment as well as compensatory, exemplary, nominal, and punitive damages.

Defendants Loring, Pewitt, and Culver filed a Motion for Summary Judgment on July 16, 1999 (Docket # 62), and defendants BOCC, Harkins, Daniels, and Corbit filed a Motion for Summary Judgment on July 19, 1999 (Docket # 63). By minute order dated November 10, 1999, the District Court referred these motions to the undersigned for Report and Recommendation. See 28 U.S.C. § 636. For the reasons set forth below, the undersigned recommends that defendants' motions be **GRANTED**.

Background

On November 19, 1996, the Ottawa County Sheriff's Department went to a home in Commerce, Oklahoma to assist in apprehending three suspects on Kansas arrest warrants. Two of the suspects were taken into custody, and they told officers that they expected the third suspect to return to the home at any time. Plaintiff and a passenger, Robert Eskina, drove slowly by the residence in a maroon, four-door 1984 Mercury with a Missouri tag. Officers observed the passenger crouch down in the seat as it passed. The officers saw occupants of the house look and point toward the car, and the car accelerated out of the neighborhood. Daniels and Corbit got into their police car and pursued the car driven by plaintiff. Daniels noticed that the left taillight of the vehicle was broken and covered with red tape. Daniels testified that he exceeded the Highway 69 speed limit to overtake and stop plaintiff, and he perceived plaintiff to be speeding. However, he did not know the speed limit on that part of the highway, he did not have radar equipment, and he was unable to pace the vehicle under the conditions at the time.

Daniels stopped the plaintiff and asked for his driver's license. Plaintiff was unable to produce one. Daniels ran a license check on plaintiff's name, date of birth, and social security number, and he discovered that plaintiff's license had expired. The passenger produced a license, but a check on it revealed that it was suspended. Daniels also ran a check on the vehicle registration, and the tag did not check to the plaintiff, the passenger, or the vehicle. It was registered to Gene Beegle as a 1982 Buick. Daniels affied that plaintiff told him the car belonged to a "friend." Plaintiff affied that he told Daniels he had just purchased the car from a friend in Missouri, and that Jean Beegle's son was using the car before plaintiff bought it.

Daniels asked plaintiff if he had any weapons in the car, and plaintiff stated that he did not. Daniels issued a citation to plaintiff for operating a motor vehicle without a driver's license. He did not issue plaintiff a citation for speeding, nor did he arrest plaintiff or the passenger. According to Daniels, he advised plaintiff that plaintiff and the passenger could leave, but the car was being impounded. Plaintiff wanted to lock the car and leave it by the side of the road until he had someone come to get it. Daniels informed him that he could not leave it unattended, and it would not be released until someone showed proof of ownership. According to plaintiff, Daniels told him and his passenger to leave. Plaintiff told Daniels that he did not want to leave his car at the side of the road, and that he would call a tow truck to come and get it, but Daniels told him he was seizing the car because neither plaintiff nor his passenger had a valid driver's license.

Plaintiff and the passenger left to walk to a nearby bar, ostensibly to make a telephone call. Daniels impounded the vehicle, and began an inventory of it. He discovered a loaded gun on the driver's side floor, a bag containing savings bonds and miscellaneous papers, and methamphetamine.

Corbit and a backup officer went to the bar in an unsuccessful attempt to locate plaintiff and the passenger.

The next day, Daniels obtained information that the gun and documents in the car driven by plaintiff matched items that had been reported stolen in a burglary in Carthage, Missouri. The car also matched the description of a vehicle identified at the scene of the burglary, and plaintiff was wanted on an outstanding warrant. On November 27, 1996, the Commerce police chief and assistant chief arrested plaintiff in Commerce on the outstanding Missouri arrest warrant. Daniels proceeded to the Ottawa County Jail, read plaintiff his Miranda rights, attempted to question him, and completed a probable cause affidavit. The District Attorney's Office filed an Information on December 4, 1996, charging plaintiff with felon in possession of a firearm, unlawful possession of methamphetamine or amphetamine, possession of stolen goods, and possession of a stolen vehicle. A bench warrant was issued for plaintiff's arrest. The Information was later amended to delete the charge of possession of a stolen vehicle.[2] Daniels completed a supplemental report at the request of defendant Culver.

At a preliminary hearing on February 26, 1997, plaintiff's motion to suppress evidence for lack of probable cause was overruled, and plaintiff was bound over for arraignment. Plaintiff claims that the attorney appointed to assist him with his defense and the attorney representing the passenger in the car plaintiff was driving on November 19, 1996, both told him that all cases in Ottawa County get bound over to trial. After the preliminary hearing, plaintiff filed a Motion to Quash the

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2 Witnesses later identified plaintiff as having driven a white Toyota pickup to the Commerce home where two of the Kansas arrest warrants were executed. A white Toyota pickup was stolen from the Carthage, Missouri home where the gun and papers found in the car plaintiff was driving on November 19, 1996, were stolen. Defendants assert that the stolen vehicle count was meant to be filed in a separate action and was erroneously included in the Information filed on December 4, 1996, charging plaintiff with felonious possession of a firearm, unlawful possession of methamphetamine or amphetamine, and possession of stolen goods.

Information, and Ottawa County Judge Sam Fullerton ordered that the "Motion to Quash Preliminary Hearing [sic] will be sustained for lack of probable cause." The order does not indicate the specific action for which the judge found lack of probable cause; thus, it is unclear whether the judge found that defendants lacked probable cause for the stop, the detention, the search, the arrest, the prosecution, or all of the above.

Discussion

Defendants BOCC, Harkins, Daniels, and Corbit argue that plaintiff has not stated a claim under 42 U.S.C. §§ 1985 or 1986; that 28 U.S.C. §1332(a)(1) is inapplicable;[3] that plaintiff has not stated a cause of action under the Fifth or Eighth Amendments; that plaintiff can prove no set of facts that would support the allegation that defendants Daniels and Corbit violated his Fourth Amendment rights; that plaintiff has failed to establish and cannot establish any relative policy decisions on the part of defendant BOCC; that defendants BOCC, Harkins and Daniels did not conspire to invent probable cause, falsely arrest plaintiff, falsely imprison plaintiff or maliciously prosecute plaintiff; and that defendants Harkins, Daniels, and Corbit are entitled to qualified immunity.

Defendants Loring, Culver and Pewit argue that they possess absolute prosecutorial immunity; that they are protected by qualified immunity; that plaintiff has failed to establish that a conspiracy

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3 This argument is superfluous. Plaintiff merely asserted that the Court has jurisdiction under this section in addition to 42 U.S.C. § 1983. It is true that plaintiff has not alleged that the amount in controversy exceeds the sum or value of $75,000, and thus, the Court does not have diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). Nonetheless, jurisdiction in this matter is based on a federal question. The Court has jurisdiction over matters brought pursuant to 42 U.S.C. § 1983. The Court also has jurisdiction over matters brought pursuant to sections 1985 and 1986. Section 1985 addresses conspiracy to interfere with civil rights, and section 1986 addresses an action for neglect to prevent a wrong addressed in section 1985. Claimant alleged conspiracy among defendants to interfere with his civil rights, but, as set forth below, he has not sufficiently stated a claim based on the alleged conspiracy. His failure to state a claim is an issue separate from lack of jurisdiction. The Court does not lack jurisdiction over this matter.

to violate his rights existed; and that they are entitled to judgment on plaintiff's malicious prosecution and false arrest claims. Defendant Loring argues separately that he is immune from suit for damages in his official capacity under the Eleventh Amendment and that plaintiff has failed to allege that he personally participated in the events in question.

The threshold issue in this matter is whether defendants are immune from suit. All defendants claim they are entitled to qualified immunity; the district attorney's office claims prosecutorial immunity; and former District Attorney Loring also claims immunity under the Eleventh Amendment. All of these issues turn on a key event: Officer Daniels' stop of plaintiff's car on the night of November 19, 1996. The stop led to Daniels' search of the vehicle, his discovery of the firearm, the stolen property, and the controlled substance, and plaintiff's arrest, detention, and prosecution. Plaintiff's argument is, in essence, that defendants are liable for their actions subsequent to the stop because the Ottawa County judge ruled that Daniels did not have probable cause. The judge's ruling meant that charges against plaintiff were dismissed. However, the ruling does not mean defendants' actions automatically subject them to liability under 28 U.S.C. § 1983.[4] The state court's determination to quash the Information or preliminary hearing for lack of probable cause does not mean that their actions were unreasonable under the circumstances.

Qualified Immunity

A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or

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4 See Kinslow v. Ratzlaff, 158 F.3d 1104, 1106 (10th Cir. 1998) (prior state court determination of issues regarding legality of search and seizure of arrestee's truck and his arrest did not bar, under doctrine of issue preclusion, litigation of those issues in arrestee's subsequent civil rights action against arresting officers after criminal charges were dismissed for lack of probable cause).

constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997). "The contours of the right allegedly violated must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Qualified immunity is "immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

The Tenth Circuit follows a two-part test once a defendant raises a qualified immunity defense: "First, the plaintiff must show the defendant's conduct violated a constitutional or statutory right; second, the plaintiff must show the right the defendant's conduct violated was clearly established such that a reasonable person in the defendant's position would have known the conduct violated the right." Lawmaster, 125 F.3d at 1347 (citing Anderson, 483 U.S. at 638-40; Harlow, 457 U.S. at 818-19); see also Siegert v. Gilley, 500 U.S. 226, 232 (1991); Anaya v. Crossroads Managed Care Systems, Inc., No. 97-1358, 1999 WL 993435, at *8 (10th Nov. 2, 1999). If the plaintiff makes such a showing, the defendant must show on motion for summary judgment that "no material issues of fact remain as to whether the defendant's actions were objectively reasonable in light of the law and the information the defendant possessed at the time of his actions." Salmon v. Schwarz, 948 F.2d 1131, 1136 (10th Cir. 1991) (citations omitted). "The question of whether the defendants are entitled to qualified immunity is a legal one; [the] court cannot avoid the question by framing it as a factual issue." Lawmaster, 125 F.3d at 1347.

All of the defendants are entitled to qualified immunity because their conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have

known. The closest question is whether a reasonable person in Officer Daniels' position would have known that stopping plaintiff's car violated plaintiff's Fourth Amendment rights.

The Stop

Plaintiff has not shown that Officer Daniels' conduct violated his Fourth Amendment right merely because the second judge in Ottawa County to consider the matter entered an order which resulted in dismissal of the charges. Nor has plaintiff shown that the right violated by Daniels' conduct was clearly established such that a reasonable person in the defendant's position would have known the conduct violated the right. Assuming that Judge Fullerton's order was, in essence, a ruling that Daniels lacked probable cause for the stop, he did not address whether Daniels had a reasonable suspicion that either the car or any of its occupants was subject to seizure in connection with the violation of any laws other than those governing the operation of motor vehicles.

The seminal case on search and seizure under the Fourth Amendment is Terry v. Ohio, 392 U.S. 1 (1968), where the Court held that a police officer acted reasonably when he seized a defendant in order to search him for weapons. After observing conduct by defendant and another consistent with the hypothesis that they were contemplating a daylight robbery, the officer approached, identified himself as officer, and asked the names of the two suspects, but nothing appeared to dispel his reasonable belief of their intent. Id. at 28. The Court summarized its conclusion in this manner:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30. The court emphasized that a valid stop must be "justified at its inception" and the resulting detention must be "reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 20. The Court also stressed that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the search or seizure. "Inarticulate hunches" and "simple good faith" are not enough. Id. at 21.

Officer Daniels observed unusual conduct by plaintiff on the evening of November 19, 1996, when the plaintiff drove slowly by the house where Daniels and other officers were waiting to apprehend a third suspect for whom they had a Kansas arrest warrant. The drive-by was unusual because it occurred in the late evening hours in a small, rural community. Traffic would not be expected to be high. Daniels observed plaintiff's passenger crouch down in the seat, and he saw persons in the residence look and point at the car. This activity lead him reasonably to conclude in light of his experience that criminal activity might have been afoot. He pursued plaintiff's car, stopped it, identified himself as a policeman and made reasonable inquiries. Neither plaintiff nor his passenger was able to produce a valid driver's license or vehicle registration. He also inquired whether plaintiff had any weapons in the car. Plaintiff lied and said that he did not. Apparently, this dispelled Daniels' reasonable fear for his own or others' safety because Daniels did not search them or detain them further. Daniels subsequently found the loaded gun, as well as methamphetamine and stolen property, as a result of an inventory taken pursuant to a proper impoundment.

Numerous cases have applied the principles of Terry in the context of a traffic stop, which is considered a seizure within the meaning of the Fourth Amendment. See Delaware v. Prouse, 440 U.S. 648, 653 (1979). In one such case, the Tenth Circuit analyzed a routine traffic stop under the

principles developed for investigative detentions set forth in Terry, and held that "[a]n initial traffic stop is valid under the Fourth Amendment not only if based on an observed traffic violation, but also if the officer has a reasonable, articulable suspicion that a traffic or equipment violation has occurred or is occurring." United States v. Hunnicutt, 135 F.3d 1345, 1348 (10th Cir. 1998); see also United States v. Ozbirn, 189 F.3d 1194, (10th Cir. 1999); United States v. Villa-Chaparro, 115 F.3d 797, 801 (10th Cir. 1997); United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995). Other cases indicate that the "reasonable, articulable suspicion" is not limited to traffic or equipment violations, but any criminal activity. See e.g., Prouse, 440 U.S. 663 (1979); United States v. Arzaga, 9 F.3d 91, 93 (10th Cir. 1993).

In this matter, the evidence indicates that a reasonable officer could have thought that plaintiff or his passenger may have been the third suspect for whom they had an arrest warrant and for whom they were waiting at the residence in Commerce. That reason alone would have given them reason for an investigatory stop under Terry. "[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion." United States v. Hensley, 469 U.S. 221, 229 (1985) (Terry stop of defendant's car was constitutionally reasonable; consequent search, seizure and arrest were lawful); see also United States v. Leyva-Serrano, 127 F.3d 1280 (10th Cir.1997) (police detective's Terry stop of defendant's auto, and the detective's search of that auto for weapons, were justified where the detective had a reasonable suspicion that the defendant was involved in or knew something about murders the detective was investigating); United States v. Douglas, No. 93-2256, 1994 WL 524981 (10th Cir. Sept. 27, 1994) (unpublished) (officer's

stop of an automobile because the passenger fit the description of a person suspected in a past armed robbery deemed reasonable).

> [W]here police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Restraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large.

Hensley, 469 U.S. at 229.

A reasonable officer could also have believed that plaintiff was speeding along Highway 69. Granted, the evidence to prove that plaintiff was speeding is weak, given that Daniels testified he had no radar gun, he did not pace the vehicle, and he did not know the speed limit on the stretch of highway where he chased and stopped the plaintiff. The second Ottawa County judge to review the matter "quashed" the preliminary hearing, resulting in dismissal of the charges. However, it does not follow that the stop was unreasonable, especially given the fact that the first Ottawa County judge to review the matter found that Daniels had probable cause. A reasonable official, confronted with the circumstances that confronted Daniels, would not necessarily understand that what he was doing violated the Fourth Amendment. In light of pre-existing law the unlawfulness was not apparent.

Nonetheless, even if the undersigned assumes that Judge Fullerton's ruling means that Daniels lacked probable cause for the stop, the Court nevertheless could determine that Daniels is entitled to qualified immunity. "Probable cause determinations, even if wrong, are not actionable as long as such determinations pass the test of reasonableness." Jeffers v. Heavrin, 10 F.3d 380, 381-82 (6th Cir. 1993) (in a civil rights action, the court ruled that an officer was entitled to qualified immunity because his decision to arrest the plaintiff was reasonable under the circumstances although the

officer's probable cause determination was wrong); see Anderson v. Creighton, 483 U.S. 635, 641 (1987). In Anderson, residents of a home brought suit against an FBI agent who conducted a warrantless search of their residence. The agent believed that a bank robbery suspect might be found in the residence, but the agent did not find the suspect there. The Anderson court acknowledged the appellate court's conclusion that the agent lacked probable cause for the warrantless search; however, it did not follow that the agent's search was objectively unreasonable. Id. at 640-41.

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.

Id. at 641. The court specifically acknowledged the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment, and specifically rejected the plaintiff's argument that qualified immunity may never be extended to officials who conduct unlawful warrantless searches. Id. at 644.

Several United States Supreme Court decisions uphold this principle in a variety of contexts. See, e.g., Hunter v. Bryant, 502 U.S. 224 (1991) (Secret Service agents were entitled to qualified immunity from liability for arrest for threatening President of United States; even if agents lacked probable cause, agents acted reasonably under settled law in the circumstances); Malley v. Briggs, 475 U.S. 335, 341 (1986) (police officers applying for warrant that allegedly caused an unconstitutional arrest are immune if a reasonable officer could have believed that there was probable cause to support the application); Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (officials alleged to have conducted warrantless wiretaps are immune unless "the law clearly proscribed the actions" they took); Davis v. Scherer, 468 U.S. 183, 190 (1984) (in a wrongful discharge action, the Court

remarked that "[e]ven defendants who violate constitutional rights enjoy qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.") As the Court recognized in Mitchell, a decision on qualified immunity is separate and distinct from the merits of the case. 472 U.S. at 527-29. The Davis Court prudently emphasized that "officials should not err always on the side of caution" because they fear being sued. 468 U.S. at 196.

For all of these reasons, Daniels' stop of plaintiff's car was "justified at its inception" and the resulting detention was "reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20.

The Detention, Impoundment, and Inventory

Daniel's immunity for the detention is contingent on immunity for the initial stop. "An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." Hunnicutt, 135 F.3d at 1349. Although Daniels' stop of plaintiff's car was not "routine," he was nonetheless entitled to ask questions and or check identification to investigate his reasonable suspicion that plaintiff was involved in or was wanted in connection with the arrest warrants the police officers were attempting to execute in Commerce. See Hensley, 449 U.S. 229. When neither he nor the passenger was able to produce a valid driver's licence or vehicle registration, he was justified in detaining the plaintiff further. "[M]ere investigatory detentions of person may require less than probable cause to be reasonable. Gallegos v. City of Colorado Springs, 114 F.3d 1024, 1028 (10th Cir. 1997).

The Hunnicutt court indicated that an officer may lengthen detention for further questioning beyond that related to the initial traffic stop "if he has objectively reasonable and articulable suspicion

illegal activity has occurred or is occurring." 135 F.3d at 1349; see also United States v. Soto-Cervantes, 138 F.3d 1319, 1322 (10th Cir.), cert. denied, 119 S. Ct. 131, 142 L.Ed.2d 106 (1998); Villa-Chaparro, 115 F.3d at 801; Ozbirn, 189 F.3d at 1199. Daniels, like the officer in Hunnicutt, had a reasonable, articulable suspicion of illegal activity supporting his continued detention of the defendant. The Hunnicutt court also approved the officer's questioning of defendant about the presence of guns or drugs because the defendant had no proof of ownership of the vehicle, no vehicle registration, no proof he was authorized to operate the vehicle, and he failed to stop promptly. Similarly, plaintiff had no proof of vehicle ownership, no vehicle registration, and no proof he was authorized to operate the vehicle.

The State of Oklahoma Council on Law Enforcement Education and Training (CLEET) issues an officers' handbook which requires officers to seize and take into custody every vehicle owned or possessed within this state not bearing and displaying a proper license plate for the current calendar year assigned to it as herein provided. . . ." (Motion for Summary Judgment filed by the BOCC, Harkins, Daniels and Corbit, Docket # 63, Ex. J.) The handbook authorizes an inventory search of the vehicle contents; however "[a]n inventory is for the protection of property and not for the purpose of searching a vehicle for evidence or contraband." (Id.) Under Oklahoma law, impoundment is lawful if conducted according to the authority of a municipal ordinance, or as a requirement of police department regulations. Starks v. State, 696 P.2d 1041, 1042 (Okla. Crim. App. 1985) (citations omitted).

Police officers are justified in impounding a vehicle where no person in the vehicle has authority to drive it or verification of insurance. Hunnicutt, 135 F.3d at 1351; see also United State v. Haro-Sacedo, 107 F.3d 769, 771 (10th Cir. 1997) (impoundment was reasonable under Utah law

where the driver had no proof of ownership, the license plates matched a different vehicle, and the driver was being arrested); United States v. Long, 705 F.2d 1259, 1262 (10th Cir. 1983) (no proof of ownership). Although standardized impoundment procedures may not serve as a "ruse for general rummaging in order to discover incriminating evidence," Florida v. Wells, 495 U.S. 1, 4, (1990); Wilson v. State, 871 P.2d 46, 50 (Okla. Crim. App. 1994), incriminating evidence obtained pursuant to a proper impoundment and inventory may be properly seized, and is admissible in criminal prosecutions. Colorado v. Bertine, 479 U.S. 367, 373-74 (1987); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976); Long, 705 F.2d at 1262.

Plaintiff argues that "[t]he only reason the officer confiscated the vehicle was that plaintiff had refused to allow him to search this vehicle." (Plaintiff's Response, Docket # 64, at 6.) However, plaintiff does not deny that neither he nor his passenger had a valid driver's license, the license plate was improper, and the vehicle was not registered properly. Daniels had authority to impound the vehicle independent from plaintiff's non-consent or any suspicion Daniels may have had that incriminating evidence might be found in the vehicle. In this respect, it is worth noting that probable cause is not required to conduct an inventory search. See Bertine, 279 U.S. at 371; Opperman, 428 U.S., at 370, n. 5.

Daniels is entitled to qualified immunity from suit based on his actions in stopping plaintiff, detaining him, searching plaintiff's car, and arresting plaintiff allegedly in violation of plaintiff's Fourth Amendment rights. For the same reasons, Corbit is also immune, although plaintiff has not sufficiently alleged that any conduct by Corbit violated his Fourth Amendment rights. Corbit accompanied Daniels, but he did not stop plaintiff's car, search it, or play any role in plaintiff's arrest. Notwithstanding plaintiff's argument that Corbit "was present at all relevant times and took no steps

to prevent Daniels, Culver, Pewitt, and Loring from filing false charges against the plaintiff" (Plaintiff's Response, Docket # 64, at 6), individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation. Foote v. Spiegel, 118 F.3d 1416 (10th Cir. 1997). Daniels and Corbit may not be held personally liable for the alleged violation of plaintiff's Fourth Amendment rights.

Conspiracy, False Arrest, False Charges, False Imprisonment, Malicious Prosecution

The remaining claims against Daniels and Corbit border on the frivolous. As discussed above, the probable cause issue was a close call, and the fact that Judge Fullerton found it lacking does not mean that these defendants unreasonably believed it was present. Plaintiff asserts that, after the allegedly illegal search and seizure, several defendants, including Daniels, conspired to falsely state that he was speeding to create a requisite basis for their assertion of probable cause for the stop. Plaintiff bases this allegation on the fact that Daniels did not cite plaintiff for speeding, the initial report completed by Daniels does not mention speeding, and the first time Daniels mentions it is in an affidavit that the Assistant District Attorney Culver office asked him to prepare prior to plaintiff's arrest. He specifically asserts that Daniels "rewrote police reports" and committed perjury at the preliminary hearing by testifying that he stopped plaintiff's vehicle because he thought plaintiff was speeding. (Amended Complaint, Docket # 57, at Ex. B, ¶¶ 12, 13.)

To recover under a conspiracy theory, a plaintiff must plead and prove not only a conspiracy between individuals but also an actual deprivation of federally protected rights. Dixon v. City of Lawton, Oklahoma, 898 F.2d 1443, 1449 (10th Cir. 1990). As set forth above, even without the speeding allegation, Daniels had a reasonable suspicion that criminal activity was afoot because of the plaintiff's drive-by of the residence where he and other officers were awaiting a suspect for whom

they had an arrest warrant. Even without probable cause, a reasonable person could find that Daniels' actions were lawful. The other defendants whom plaintiff claims were involved in the alleged conspiracy, Culver, Pewitt, and Harkins and the BOCC, were also justified in believing that Daniels' actions were lawful. Daniels is entitled to summary judgment as to plaintiff's conspiracy allegations.

Further, there is no genuine issue of material fact precluding summary judgment for Daniels with regard to plaintiff's allegations that Daniels falsely arrested, charged, imprisoned, or prosecuted him. Plaintiff does not deny that he possessed a loaded firearm, stolen property, and methamphetamine. Although plaintiff was initially charged with possession of a stolen vehicle, the information was later amended to delete the charge of possession of a stolen vehicle. Plaintiff's claim of false imprisonment is conditioned on his allegations of false arrest, which is, in turn, conditioned on his allegations of illegal search and seizure. Thus, his false imprisonment claim is invalid for the same reasons as the claims on which it is based.

Technically, there is no evidence that Daniels filed the charges against plaintiff, imprisoned him, or prosecuted him although Daniels completed the probable cause affidavit that led to plaintiff's arrest, and he verified the charges against plaintiff contained in the Information. Plaintiff has confused the issues by naming Daniels with defendants Culver, Pewitt, Harkins, and BOCC and claiming that all of these defendants "conspired to invent probable cause, falsely arrested, imprisoned, and maliciously prosecuted the plaintiff" in violation of the plaintiff's rights "under the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. (Amended Complaint, Docket # 57, at 3.) Although he also individualizes the claims he makes against each defendant, it is not clear what claims he is making against each defendant and pursuant to which amendment.

Nonetheless, plaintiff has failed to show, by reference to the Fifth, Eighth, and Fourteenth Amendments, that any defendant's conduct violated a constitutional or statutory right. As defendants note, the Fifth Amendment applies only to federal actors. See Smith v. Kitchen, 156 F.3d 1025, 1028 (10th Cir. 1997). Defendants were state actors, not federal actors. The Eighth Amendment is inapplicable because plaintiff was a pre-trial detainee, and the Eighth Amendment is not applicable to pre-trial detainees. See Lopez v. LeMaster, 172 F.3d. 756, 759 n. 2 (10th Cir. 1999). Presumably, plaintiff is asserting his rights pursuant to the due process clause of the Fourteenth Amendment. However, his allegations of false arrest, false charges, false imprisonment, and malicious prosecution do not give rise to a due process claim in this matter. Daniels is entitled to qualified immunity and summary judgment on plaintiff's claims against him.

Defendant Harkins

The Court takes judicial notice of Sheriff Harkins' death. Janet Warford-Perry, *Sheriff Slain at Home*, TULSA WORLD, December 13, 1999, at A1. The Court has not been informed of Harkin's successor or representative pursuant to the rule permitting the substitution of parties, nor has the action been dismissed as to Harkins in his individual capacity. Fed. R. Civ. P. 25(a). Since plaintiff also sued Harkins in his official capacity as Ottawa County sheriff, Harkins' successor will automatically be substituted as a party, and those claims will be considered as a suit directly against Ottawa County. The following discussion is directed to plaintiff's claims against Harkins in his individual capacity. The claims against Harkins in his official capacity are addressed separately below.

Plaintiff alleges that Sheriff Harkins failed to train and properly supervise his deputy sheriffs and falsely imprisoned plaintiff in the Ottawa County Jail. Sheriff Harkins, however, is entitled to qualified immunity on these issues because plaintiff has failed to show that he violated clearly

established federal statutory or constitutional rights of which a reasonable person would have known. See Taylor v. Meacham, 82 F.3d 1556 (10th Cir. 1996) (sheriff was entitled to qualified immunity where plaintiff did not show that the sheriff falsely arrested, falsely imprisoned, or maliciously prosecuted plaintiff). As defendants point out, a sheriff's job is to detain "persons charged with offenses, and duly committed for trial" in the county jail. Okla. Stat. tit. 52, § 42 (1991). A ruling that authorities lacked probable cause to initially stop, search, seize, arrest, or charge the person detained does not give rise to a claim that the sheriff is liable for improperly detaining the person or, as plaintiff asserts, "falsely imprisoning" him. If, after the first Ottawa County judge found probable cause, the sheriff had refused to detain plaintiff on speculation or assumption that a second judge would find a lack of probable cause, he would have been derelict in his duties.

Plaintiff's claim that Sheriff Harkins failed to train and properly supervise his deputy sheriffs fails on the merits. Sheriff Harkins did not become sheriff of Ottawa County until January 2, 1997 -- after the allegedly illegal search and seizure by Daniels and Corbit which set in motion the arrest, filing of charges, imprisonment, and prosecution. He would not have had any duty to train or supervise his deputy sheriffs until after that date, and his training and supervision of the deputy sheriffs would not have occurred until after the illegal conduct plaintiff attributes to them. Thus, it would not have prevented the alleged illegal conduct.[5]

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5 Plaintiff also asserts that "a newly elected sheriff inherits the liabilities of his predecessor." (Plaintiff's Response, Docket # 64, at 5-6.) However, he cites no authority for this proposition. Under Fed. R. Civ. P. 25, Harkins was automatically substituted as a party only in his official capacity. To the extent that he is suing Harkins in his official capacity and thus, attempting to hold the county government liable, plaintiff must prove that his constitutional rights were violated as a result of an official policy or custom caused a constitutional violation. See the discussion related to "official capacity" claims below.

It is well-established that individual liability does not attach to a supervisor unless an "affirmative link" exists between an alleged constitutional violation and the supervisor's exercise of control or direction, or his failure to supervise. Rizzo v. Goode, 423 U.S. 362, 371 (1976); see Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997); Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988). Further, to hold a superior liable for the acts of an inferior, the supervisor "must have participated or acquiesced in the constitutional deprivations." Meade, 841 F.2d at 1527 (citation omitted). A sheriff, in particular, is subject to liability in a § 1983 action whenever he or she "knew or should have known of the misconduct, and yet failed to prevent future harm." Id. at 1528 (citation omitted). Sheriff Harkins did not fail to prevent future harm and he did not know, nor should he have known, of any misconduct because there was none.

In other words, plaintiff's claims against Harkins fail because neither Daniels nor Corbit violated plaintiff's constitutional rights. "A claim of inadequate training, supervision, and policies under § 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violations by the person supervised." Webber v. Mefford, 43 F.3d 1340, 1344-45 (10th Cir. 1994). Plaintiff's attempts to hold the BOCC liable for a failure to "supervise and control county officials" who "arrested and prosecuted [plaintiff] in their name" (Plaintiff's Response, Docket # 64, at 7) and his attempts to hold Loring liable for failure to train and supervise his subordinates (Amended Complaint, Docket # 57, at Exh. "C"- "D", at ¶21) are invalid for the same reason: there is no underlying constitutional violation.

The undersigned recommends summary judgment in Harkins' favor on all of the additional claims against him. Plaintiff's claims against Harkins based on a conspiracy and false arrest fail for the same reasons, discussed above, that plaintiff's conspiracy and false arrest claims fail against

Daniels and Corbit. Although Harkins was a sheriff, not a prosecutor, he could be held liable for malicious prosecution, but only if plaintiff proved a constitutional violation. The Tenth Circuit "takes the common law elements of malicious prosecution as the 'starting point' for the analysis of a § 1983 malicious prosecution claim,[6] but always reaches the ultimate question, which it must, of whether the plaintiff has proven a constitutional violation." Meacham, 82 F.3d at 1561 (footnote added). Plaintiff failed to prove an underlying constitutional violation, and, as in Meacham, any malicious prosecution claim against Sheriff Harkins based on events occurring after plaintiff's arrest was vitiated by the preliminary hearing and judicial determination to bind plaintiff over for trial. Id. at 1563-64. As discussed herein, Harkins is not liable in his individual or his official capacity for failure to train and supervise his deputies, conspiracy, false arrest, falsely imprisonment, or malicious prosecution.

Official Capacity Claims

Qualified immunity is only available to defendants sued in their individual capacities. Hafer v. Melo, 502 U.S. 21, 25-26 (1991); Kentucky v. Graham, 473 U.S. 159, 166-67 (1985). Plaintiff has sued Harkins, the BOCC,[7] and Loring in their official capacities. Naming a government official in his official capacity is the equivalent of naming the government entity itself as the defendant and requires the plaintiff to prove an official policy or custom as the cause of the constitutional violation.

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6 The common law elements of malicious prosecution action are "(1) the bringing of the original action by the defendant; (2) its successful termination in favor of the plaintiff; (3) want of probable cause to bring the action; (4) malice; and (5) damages." Parker v. Midwest City, 850 P.2d 1065, 1067 (Okla. 1993). Plaintiff has not specifically alleged, nor is there any evidence to suggest, that Harkins acted with malice. "To show malice in a malicious prosecution claim, the defendant must have acted because of ill-will or hatred, or willfully in a wanton manner." Id. at 1068.

7 Plaintiff has apparently named the BOCC because "[i]n all suits or proceedings by or against a county, the name in which a county shall sue or be sued shall be, 'Board of County Commissioners of the County of _____,'" Okla. Stat. tit. 19, § 4 (1991).

See Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978); Lopez v. Lemaster, 172 F.3d 756, 762 (10th Cir. 1999). As set forth above, plaintiff's claims against the BOCC in this matter fail because he has failed to show any underlying constitutional violation. A local governmental entity cannot be held liable in a suit based on the actions of its officers where there is no underlying constitutional violation by any of its officers. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986); see also Wilson v. Meeks, 98 F.3d 1247, 1255 (10th Cir. 1996); Hinton v. City of Elwood, Kansas, 997 F.2d 774, 782 (10th Cir.1993).

Although plaintiff alleges that the BOCC falsely arrested, imprisoned and maliciously prosecuted the plaintiff (Amended Complaint, Docket # 57, at 1), he attempted to clarify his allegations by stating that the BOCC had an "unwritten policy and custom of tolerating unlawful arrests, knowing there is no probable cause for those arrests, charges, imprisoning and maliciously prosecuting citizens only to dismiss the charges after months of imprisonment," and the BOCC "failed to train and supervise their subordinates in that it is a common practice in Ottawa County to violate the constitutional rights of citizens and shows a deliberate indifference to those rights secured to the plaintiff by the United States Constitution." (Id., Exs. "C" and "D", ¶¶ 20, 21.) He reiterated his allegations in his response to defendant's motions for summary judgment by claiming that the BOCC "engaged in a pattern of allowing the prosecutor's office to file false charges against citizens and engaging in false arrests." He claims that two attorneys told him that the judge does not dismiss any charges at the probable cause hearing level in Ottawa County. He points out, as an example, that his friend Robert Eskina (the passenger in his car on the evening of November 19, 1996) had been falsely arrested, charged, and imprisoned in Ottawa County previously and the charges were dismissed. (Plaintiff's Response, Docket # 64, at 7.)

Evidence of a single violation of federal rights is sufficient to trigger municipal liability, but only if it is accompanied by a showing that a municipality has failed to train (or supervise, discipline, screen or hire, etc.) employees to handle recurring situations presenting an obvious potential for such a violation. Allen v. Muskogee, 119 F.3d 837, 841 (10th Cir. 1997). Further, a single *decision* by an official with policymaking authority in a given area may constitute official policy and be attributed to the government itself under certain circumstances, Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); see also Meade v. Grubbs, 841 F.2d 1512, 1529 (10th Cir. 1988), but that decision must be accompanied by evidence proving fault and causation. Board of County Com'rs v. Brown, 520 U.S. 397, 415 (1997). A subordinate's discretionary decision and the basis for it must be approved by policymakers if it is to be attributable to the municipality. Mere inaction by the policymakers is not ratification of the decision or a delegation of policymaking authority to the subordinate. City of St. Louis v. Praprotnik, 485 U.S. 112, 129-30 (1988).

There is no evidence in this action that Harkins, the BOCC, nor Loring officially adopted or promulgated any policy of inadequate training and supervision. Nor has plaintiff shown a "known pattern" or "custom" of such inadequate training and supervision. The dismissal of charges does not indicate that the charges were false when filed. An arrest is not false merely because a judge subsequently rules that the officials who made the arrest lacked probable cause. Plaintiff's unsupported allegation that two attorneys told him that the judge does not dismiss any charges at the probable cause hearing level in Ottawa County does not establish a pattern of unconstitutional conduct. Furthermore, neither Harkins, nor the BOCC, nor Loring has any authority over the judges who make probable cause determinations. The fact that the charges against plaintiff and his friend Eskina were dismissed does not equate with a violation of their constitutional rights. Plaintiff has not

shown that any subordinate in this matter violated his constitutional rights; nor has he shown that the superiors, policymakers, or governing bodies approved or ratified any decision constituting a policy or custom that caused a violation of plaintiff's constitutional rights. Defendants BOCC, Loring and Harkins are not liable in their official capacities for any constitutional violations.

Loring, in particular, is also immune from suit in his official capacity pursuant to the Eleventh Amendment. The Eleventh Amendment precludes a federal court from assessing damages against state officials sued in their official capacities because such suits are in essence suits against the state. Hunt v. Bennett, 17 F.3d 1263, 1267 (10th Cir. 1994) (affirming the dismissal of a § 1983 complaint against a deputy district attorney for allegedly violating a prisoner's constitutional rights during a criminal investigation and trial that resulted in the prisoner's conviction of felony offenses); see also Russ v. Uppah, 972 F.2d 300, 303 (10th Cir.1992). However, the Eleventh Amendment does not bar a suit seeking damages against state officials in their individual capacities. Id. (citing Hafer, 502 U.S. at 31). Thus, Loring has no immunity from suit solely because of his status as a state prosecutor, but he may have personal immunity for the initiation and pursuit of the criminal prosecution against plaintiff, as discussed below.

The District Attorney's Office

Plaintiff's malicious prosecution claims, like his claims of false arrest and imprisonment, are based upon his fallacious assumption that a lack of probable cause for the initial stop automatically means that the subsequent arrest, charges, incarceration, and prosecution violate his constitutional rights. Plaintiff claims that Loring filed false charges against him without probable cause and that Loring, Pewitt, and Culver "filed false charges, falsely imprisoned and maliciously prosecuted plaintiff without probable cause and knowing it would cause a constitutional violation, showing a deliberate

indifference to the plaintiff's constitutional rights." (Amended Complaint, Docket # 57, at 2-3.) Plaintiff also claims that Pewitt and Culver "[c]onspired with other defendants to file false charges and promote perjured testimony to false arrest, imprison and maliciously prosecute the plaintiff." (Id. at "A".)

The conspiracy and false arrest claims against Pewitt and Culver fail for the same reasons they failed against Daniels, Harkins, and the BOCC, as discussed above. The false imprisonment and malicious prosecution claims fails for the same reason they failed against Harkins. Incidentally, there is no evidence that Loring, Pewitt, or Culver arrested or imprisoned plaintiff. They did file charges and prosecute him, but not falsely or maliciously. Plaintiff does not deny that he had a loaded gun, stolen property, and controlled substances in his possession. Although a judge subsequently determined that defendants lacked probable cause, that does not mean that reasonable officials would understand that what they were doing violated plaintiff's constitutional rights. Loring, Culver, and Pewitt are entitled to qualified immunity from plaintiff's claims, but, more importantly, that are entitled to absolute immunity as prosecutors.

State prosecuting attorneys who act within the scope of their duties in initiating and pursuing a criminal prosecution and in presenting the state's case are absolutely immune from civil suit for damages under the Civil Rights Act of 1871 for alleged deprivations of an accused's constitutional rights. Imbler v. Pachtman, 424 U.S. 409, 430 (1976); United States v. McKinley, 53 F.3d 1170, 1172 (10th Cir. 1995); Hunt v. Bennett, 17 F.3d 1263, 1267 (10th Cir. 1994). The Imbler court made it clear that prosecutors are absolutely immune for any activity "intimately associated with the judicial phase of a criminal process," 424 U.S. at 430, but subsequent cases have clarified that they are entitled only to qualified immunity when they are engaged in administrative or investigative duties

"that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993); see also Kalina v. Fletcher, 522 U.S. 118, ___, 118 S. Ct. 502, 509 (1997); DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993).

Pewitt filed the Information based on Daniels' probable cause affidavit and Daniels' account of the events of November 19, 1996. Culver requested that Daniels prepare a written supplement to his earlier report with a more detailed account of the events. Culver and Pewitt amended the Information to eliminate the stolen vehicle charge and correct certain errors. Both prosecutors questioned plaintiff and other witnesses and presented evidence in the preliminary hearing. Both filed motions and responses to plaintiff's motions in the criminal case.

All of these activities, with the exception of Culver's request that Daniels complete a supplemental report, are "intimately associated with the judicial phase of a criminal process." Imbler, 424 U.S. at 430. Culver's request is also arguably related to an his preparation for the initiation of a prosecution or for judicial proceedings, but it could also be considered an investigative activity that is not subject to prosecutorial immunity. Defendants attempt to distinguish the act from the prosecutor's investigative act in Buckley, where the prosecutor was alleged to have fabricated evidence during the preliminary investigation of a crime and prior to the time anyone was charged with the crime. 113 S. Ct. at 2616-17. Defendants assert that Culver made his request subsequent to the filing of charges. (Motion for Summary Judgment filed by Loring, Pewitt, and Culver, Docket # 62, at 8 n. 3.) Daniels testified that he completed the report after the filing of charges (id., Ex. A, at 5, ¶ 29); however, there is no date on the supplemental report. (See Motion for Summary Judgment filed by BOCC, Harkins, Daniels, and Corbit, Docket # 63, Ex. L.)

Regardless of whether Daniels completed the supplemental report before or after the filing of charges, Culver is entitled to qualified immunity because plaintiff has not established that Culver's conduct violated clearly established federal statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). As discussed above, Daniels' stop of plaintiff's car was reasonable under the circumstances irrespective of his inability to prove that plaintiff was speeding. Plaintiff has not established that Culver or Pewitt falsely arrested, falsely charged, falsely imprisoned, maliciously prosecuted, or "conspired to invent probable cause." (Amended Complaint, Docket # 57, at 3, Ex. "A".) As defendants point out, there is no evidence that Loring performed any duty or participated in plaintiff's prosecution. Loring was not involved in the events which are the subject of this action. As set forth above, he is not liable in his supervisory role or his official capacity. He is also entitled to prosecutorial and qualified immunity for the same reasons as Pewitt and Culver. Loring, Culver, and Pewitt are entitled to prosecutorial and qualified immunity.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see generally Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a

> showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 317.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff. Anderson, 477 U.S. at 252.

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garrett v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998). In addition, *pro se* petitions must be read liberally and "held to a less stringent standard than formal pleadings drafted by lawyers." Green v. Branson, 108 F.3d 1296, 1303 (10th Cir. 1997) (citing Riddle v. Mondrageon, 83 F.3d 1197, 1202 (10th Cir. 1996)).[8] Even though the undersigned

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8 However, the undersigned notes that plaintiff's pleadings are exceptionally well-drafted for a *pro se* plaintiff.

has construed the record in the light most favorable to the *pro se* plaintiff in this matter, defendants are entitled to summary judgment.

As set forth above, all of the defendants are immune from suit. They are entitled to qualified immunity because their conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. A reasonable person in Daniels' position would not have known that stopping plaintiff's car violated plaintiff's Fourth Amendment rights. He believed that plaintiff was speeding and that belief was not unreasonable, given plaintiff's "drive-by" of the residence where Daniels and other law enforcement officials were waiting with an arrest warrant for a third suspect. Daniels had a reasonable suspicion that plaintiff or his passenger were engaged in criminal activity. Moreover, case law permits the Court to determine that Daniels is entitled to qualified immunity even if the Court assumes that Daniels lacked probable cause.

The subsequent detention, impoundment, and inventory search were justified because plaintiff was unable to produce a valid driver's license, and the license plate on the vehicle did not register to plaintiff, his passenger, or the car. Plaintiff has not sufficiently alleged that any conduct by Corbit violated his Fourth Amendment rights. Plaintiff's remaining claims against Daniels are without merit. There is no evidence to indicate that Daniels falsely arrested, charged, imprisoned, or prosecuted him, or that any of the defendants conspired to invent probable cause. Plaintiff has failed to show, by reference to the Fifth, Eighth, and Fourteenth Amendments, that any defendant's conduct violated a constitutional or statutory right.

Sheriff Harkins, in particular, is not liable in his individual or his official capacity for failure to train and supervise his deputies, conspiracy, false arrest, false imprisonment, or malicious prosecution. In detaining plaintiff, the sheriff was fulfilling his duty to detain persons charged with

offenses in the county jail. He could not have failed to train and properly supervise his deputy sheriffs before he was elected. More important, Harkins cannot be held liable if there was no underlying constitutional violation by Daniels and Corbit. Nor can Loring be held liable in a supervisory role if there is no underlying violation by Pewitt and Culver. Without an underlying violation or a showing of malice, plaintiff's malicious prosecution claims against Loring, Pewitt, Culver, and Harkins likewise fail. Plaintiff's claims against Harkins based on a conspiracy and false arrest fail for the same reasons that plaintiff's conspiracy and false arrest claims failed against Daniels and Corbit.

Plaintiff's claims against Harkins, Loring, and the BOCC in their official capacity also fail because he has failed to show any underlying constitutional violation. There is no evidence of any policy or custom of inadequate training and supervision. Loring is immune under the Eleventh Amendment from suit in his official capacity because he is a state actor. He is immune from suit in his individual capacity based on the doctrines of prosecutorial and qualified immunity. Pewitt and Culver also enjoy both absolute and qualified immunity for their prosecutorial, administrative, or investigative activities in this matter.

The evidence does not present a sufficient disagreement to require submission to a jury; instead, it is so one-sided that one party must prevail as a matter of law. The undersigned believes that the record taken as a whole could not lead a rational trier of fact to find for the plaintiff. Without a genuine issue for trial, defendants are entitled to summary judgment.

RECOMMENDATION

For the reasons cited herein, the undersigned recommends that the Motion for Summary Judgment filed by defendants Loring, Pewitt and Culver on July 16, 1999 (Docket # 62), and Motion

for Summary Judgment filed by defendants BOCC, Harkins, Daniels and Corbit on July 19, 1999 (Docket # 63) be **GRANTED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); and § 2254, Rules 8, 10; see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

Dated this 28th day of December, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 29 Day of Dec, 1999.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL JOHNSON; TERRY MCMINN; THOMAS MEASLES; DIANE PRENTICE; THOMAS PRESSLER; LYNDA PURSER; ROSE ROBINSON; WILLIAM TAYRIEN; PAMELA WHALER,

Plaintiffs,

vs.

SMITH & NEPHEW RICHARDS, INC.,

Defendant.

FILED

DEC 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-00363K

ENTERED ON DOCKET
DEC 29 1999
DATE

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Michael Johnson, Terry McMinn, Diane Prentice, Thomas Pressler, Lynda Purser, William Tayrien, and Pamela Whaler, and the Defendant, Smith & Nephew, Inc, formerly known as Smith & Nephew, Richards, Inc., and stipulate pursuant to Federal Rules of Civil Procedure, Rule 41, that this action be dismissed with prejudice as to the named plaintiffs, only, each party to bear their own costs.

Dated this 28 day of Dec, 1999.

PLAINTIFFS,

BY: _____

Bradley C. West, OBA #13476
THE WEST LAW FIRM
124 West Highland
Shawnee, Oklahoma 74801
(405)275-0040

DEFENDANT, Smith & Nephew, Inc.

BY: _____

Richard M. Eldridge, OBA #2665
Thomas E. Steichen, OBA # 8590
RHODES, HIERONYMUS, JONES, TUCKER & GABLE
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELDON CARTMELL,

Plaintiff,

vs.

SMITH & NEPHEW RICHARDS, INC.,

Defendant.

Case No. 97-CV-00488K

ENTERED ON DOCKET

DEC 28 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Eldon Cartmell, and the Defendant, Smith & Nephew, Inc, formerly known as Smith & Nephew, Richards, Inc., and stipulate pursuant to Federal Rules of Civil Procedure, Rule 41, that this action be dismissed with prejudice, each party to bear their own costs.

Dated this 28 day of Dec, 1999.

PLAINTIFF,

BY: _____

Bradley C. West, OBA #13476
THE WEST LAW FIRM
124 West Highland
Shawnee, Oklahoma 74801
(405)275-0040

DEFENDANT, Smith & Nephew, Inc.

BY: _____

Richard M. Eldridge, OBA #2665
Thomas E. Steichen, OBA # 8590
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173

MT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID BAUMAN; STELLA WHITTEN;

Plaintiffs,

vs.

SMITH & NEPHEW RICHARDS, INC.,

Defendant.

Case No. 97-CV-364K(E)

ENTERED ON DOCKET
DATE DEC 28 1999

JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Stella Whitten, and the Defendant, Smith & Nephew, Inc, formerly known as Smith & Nephew, Richards, Inc., and stipulate pursuant to Federal Rules of Civil Procedure, Rule 41, that this action be dismissed with prejudice as to the named plaintiff, only, each party to bear their own costs.

Dated this 28 day of Dec, 1999.

PLAINTIFF, Stella Whitten

BY: _____

Bradley C. West, OBA #13476
THE WEST LAW FIRM
124 West Highland
Shawnee, Oklahoma 74801
(405)275-0040

DEFENDANT, Smith & Nephew, Inc.

BY: _____

Richard M. Eldridge, OBA #2665
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Tulsa, Oklahoma 74121-1100
(918) 582-1173

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CJ

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD STEWART,	)	
SSN: 448-48-2300,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-0270-EA**
	)	
KENNETH S. APFEL, Commissioner,	)	
Social Security Administration,	)	
	)	
Defendant.	)	

DEC 28 1999

ADMINISTRATIVE CLOSING ORDER

Pursuant to N.D. LR 41.0, the Court Clerk is directed to administratively close this case. At the request of the parties, the Court has remanded this case for further administrative action pursuant to sentence 6 of 42. U.S.C. § 405(g). The case may be reopened by either party once defendant has completed its additional administrative action.

IT IS SO ORDERED this 27th day of December, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
DEC 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD STEWART,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

EA

Case No. 99-CV-270-BU(E)

ENTERED ON DOCKET
DEC 28 1999

O R D E R

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 27th day of December 1999.

Claire V. Eagan
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

CANTHRYN ~~McCLANAHAN~~, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE E. GARNER,	:	
Plaintiff,	:	
vs.	:	CASE NO. 99CV0123B(N)
STANLEY STEEMER INTERNATIONAL, INC., et al.,	:	JUDGE THOMAS R. BRETT
Defendants.	:	

ENTERED ON DOCKET
DATE DEC 28 1999

ORDER

The Court, by agreement of the parties, hereby grants the Motion of Defendants Mike Baker, David Estes and Douglas Dykes to Dismiss Plaintiff's Complaint.

Judge Thomas R. Brett
United States District Judge

12/20/99 - 8606501

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 28 1999
Phil Lombardi,
U.S. DISTRICT COURT

DEAN CUTTING,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-373-J

ENTERED ON DOCKET
DATE DEC 28 1999

JUDGMENT

This action has been remanded to the Commissioner of the Social Security Administration pursuant to the request of Defendant. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 27th day of December 1999.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEAN CUTTING,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-373-J

ENTERED ON DOCKET
DATE DEC 28 1999

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 28 day of December, 1999.

Sam A. Joyner
United States Magistrate Judge

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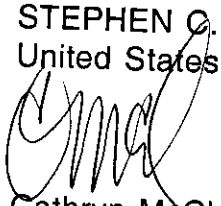
SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



Cathryn McClanahan, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT L. BIBBS,
SSN: 441-58-9598,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 99-CV-116-M

ENTERED ON DOCKET
DEC 27 1999
DATE

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 23rd day of Dec., 1999.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUTH GARRETT'S ESTATE,

Plaintiff,

v.

STATE OF OKLAHOMA, PAUL SIEGLER, DIANN YOUNG, SHELLY CLEMMONS, CURTIS DeLAPP, MARGARET SNOW, THOMAS "TOM" JANER, CITY OF BARTLESVILLE, and RICK ESSER,

Defendants.

ENTERED ON DOCKET

DATE DEC 28 1999

No. 99-CV-1000-K (E)

FILED

DEC 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendant Paul Sigler's (captioned as "Paul Siegler") motion to dismiss for lack of subject matter jurisdiction, frivolous and malicious action, and lack of standing.

Plaintiff has failed to respond to Defendant's motion to dismiss. Pursuant to N.D. LR 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed Defendant's motion to dismiss, and, through an independent inquiry, has determined that Plaintiff's claims against Defendant Sigler should be dismissed.

For the reasons stated herein, the Motion to Dismiss Defendant Paul Sigler (# 5) is GRANTED and all claims in the above-captioned action against Defendant Sigler are DISMISSED.

ORDERED this 27 day of December, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99-CV-778B(E)
	)	
MEREDITH A. SWIMMER A/K/A MEREDITH ANN SWIMMER,	)	
	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE DEC 27 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 23rd day of December, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Meredith A. Swimmer a/k/a Meredith Ann Swimmer, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Meredith A. Swimmer a/k/a Meredith Ann Swimmer, was served with Summons and Complaint on November 10, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Meredith A. Swimmer a/k/a Meredith Ann Swimmer, for the principal amount of

$3,942.99, plus accrued interest of $3,681.71, plus administrative charges in the amount of $40.00, plus interest thereafter at the rate of 7.51 percent per annum until judgment, plus filing fees in the amount of $150.00 as prcvided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.6707% percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/dlo

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 27 1999

MICHAEL RAY HUDELSON,

PLAINTIFF,

V.

ANNA MARIE COWDREY, in Her Individual Capacity; RICK PHILLIPS, in His Individual Capacity.

DEFENDANTS.

CASE NO. 98-CV-867-B

FILED
DEC 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for jury trial before the Court, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered by the jury,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Michael Ray Hudelson, take nothing on his claims against Defendant, Anna Marie Cowdrey, that the action be dismissed on the merits as to the Defendant, Anna Marie Cowdrey, and that Defendant, Anna Marie Cowdrey, recover her costs of action upon proper application pursuant to N. D. LR 54.1.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Michael Ray Hudelson, recover of the Defendant, Rick Phillips, the sum of One Thousand Seven Hundred Ninety-two dollars and seventy five cents ($1,792.75), with interest thereon at the statutory rate of %5.6707 from date of judgment and costs

of action and attorney fees upon proper application pursuant to N. D. LR 54.1, and 54.2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, Anna Marie Cowdrey, take nothing on her counterclaim against the Plaintiff, Michael Ray Hudelson, that the counterclaim be dismissed, and that the Plaintiff, Michael Ray Hudelson, recover his costs of action upon proper application pursuant to N. D. LR 54.1.

DATED THIS 23RD DAY OF DECEMBER AT TULSA, OKLAHOMA.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY MCELWAIN, an individual	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CASE NO. 99-CV-475 B (J)**
	)	
TERRA NITROGEN, INC., a Delaware Corporation, and TERRA NITROGEN CORPORATION, a Delaware Corporation	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE DEC 27 1999

ORDER OF DISMISSAL WITH PREJUDICE

On December 17, 1999, the above-styled case came on for status hearing and case management conference. Defendants Terra Nitrogen, Inc. and Terra Nitrogen Corporation, by and through their counsel, William D. Fisher, appeared and announced their intentions to proceed. Plaintiff Mary McElwain failed to appear. Accordingly, the Court finds that Plaintiff's claims against Defendants Terra Nitrogen, Inc. and Terra Nitrogen Corporation shall be dismissed with prejudice, pursuant to Fed. R. Civ. P. 41(b), for Plaintiff's failure to prosecute. Each party shall bear their own costs and attorneys' fees.

IT IS SO ORDERED this 23rd day of December, 1999.

Hon. Thomas R. Brett, Senior Judge
United States District Court

Doc#: 128974 Ver#: 1 810448:01314

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F I L E D
DEC 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT L. BIBBS,
441-58-9598

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-116-M

ENTERED ON DOCKET
DATE DEC 27 1999

ORDER

Plaintiff, Robert L. Bibbs, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971)

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[1] Plaintiff's October 5, 1995, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 9, 1997. By decision dated February 25, 1998, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 22, 1999. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born March 14, 1954, and was 43 years old at the time of the hearing. He has a General Equivalency Diploma and formerly worked as a cook and a construction laborer. He claims to have been unable to work since August of 1995 because of anxiety and pain resulting from an August 1995 surgical repair of an aortic aneurysm, pain in his back, numbness in his hands, headaches, and daily vomiting.[2] The ALJ determined that Plaintiff had the following limitations: he cannot lift more than 20 pounds occasionally or 10 pounds frequently; perform extensive walking; he must briefly change position every hour; he cannot operate controls with his arms or perform overhead reaching more than occasionally; he cannot stoop crouch, bend or crawl more than occasionally; he can never climb scaffolding, ropes, or ladders; he cannot climb stairs or operate a vehicle more than occasionally; and he cannot tolerate exposure to high temperatures, humidity, constant vibrations, or concentrations of gases, dust, or fumes. [R. 14]. Although these limitations prevent Plaintiff's return to his past relevant work, based on the testimony of the vocational expert, the ALJ determined that there are a significant

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[2] Plaintiff's insured status expired on September 30, 1996, for purposes of Title II benefits he must show that he became disabled on or before that date. For Title XVI (SSI) benefits, he need only show that he is currently disabled.

number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ erred "in evaluating the claimant's disabling pain, including applying incorrect standards, making unwarranted assumptions, distorting the record, and ignoring factors supportive of claimant's testimony." [Dkt. 7]. The Court finds that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

The court rejects Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). In concluding that the medical evidence does not support the presence of a disabling impairment which lasted fully twelve months, the ALJ throughly and accurately recounted the record, and fully explained the basis for his decision. Thus, the ALJ properly linked his credibility finding to the record. Therefore the court finds that this case presents no reason to deviate from the general rule which accords deference to the ALJ's pain and credibility determinations. *James v. Chater,* 96 F.3d 1341, 1342 (10th Cir. 1996) (witness credibility is province of Commissioner whose judgment is entitled to considerable deference).

The court finds that the ALJ evaluated the record, Plaintiff's credibility, and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts. The decision of the Commissioner finding Plaintiff not disabled is AFFIRMED

SO ORDERED this 23rd Day of December, 1999.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSE F. CASTILLO,
SSN: 464-88-1674,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 98-CV-910-M

ENTERED ON DOCKET

DATE DEC 27 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 23rd day of Dec., 1999.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSE F. CASTILLO,
464-88-1674

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 98-CV-910-M

ENTERED ON DOCKET

DATE DEC 27 1999

ORDER

Plaintiff, Jose F. Castillo, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

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[1] Plaintiff's protectively filed May 15, 1995, applications for Supplemental Security Income benefits and for Title II disability benefits were denied. The denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 5, 1996. By decision dated January 30, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 16, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 25, 1947, and was 49 years old at the time of the hearing. He has a 4th grade education and formerly worked as a general laborer, machine operator, carpenter, and Goodwill attendant. He claims to be unable to work since November 20, 1990,[2] as a result of eye, right shoulder, pain in lungs and ribs, breathing and back injury. The ALJ determined that although Plaintiff is unable to perform his past relevant work, he was capable of performing light work with no more than occasional stooping, crawling, crouching, and bending. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining

[2] Plaintiff's earlier applications for benefits (1985 and 1990) were denied and not appealed. The relevant time period runs from the date of the previous denial, November 20, 1990, to the date his insurance expired, December 31, 1991, for purposes of disability benefits under Title II of the Social Security Act, and through the date of the ALJ's decision for purposes of eligibility for Supplemental Security Income benefits.

whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) relied on the absence of evidence to support his finding at step-five; and (2) failed to properly evaluate Plaintiff's subjective complaints. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

The court finds Plaintiff's argument that the ALJ relied on the absence of evidence to be without merit. The ALJ relied on the objective findings of the consultative evaluation performed on September 27, 1995. The consultative examiner found that although medical care would probably help Plaintiff's symptomatology, he had a slightly slow, but stable and safe gait; dexterity of gross and fine manipulation; no joint deformities or swelling; and grip strength measured at 28 kg right and 39 kg left. [R. 363]. The ALJ also relied on the October 1990 letter from Dr. Schlecht expressing his opinion that as of February 14, 1989, there was no objective evidence of disability and that Plaintiff could return to work [R. 354].

The court finds that the ALJ properly evaluated Plaintiff's subjective complaints of pain. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908

F.2d 585, 587 (10th Cir. 1990). The ALJ noted the lack of treatment for many of Plaintiff's complaints, lack of objective support in the medical record for some complaints, and the fact that Plaintiff does not require prescription pain medication. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

The decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 23rd Day of December, 1999.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

MT 12-17-99

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BANK OF OKLAHOMA, N.A., a national banking association, as TRUSTEE of the WORLD PUBLISHING COMPANY 401K PLAN,

Plaintiff,

vs.

ELAINE AUDWIN TIFFANY, an incompetent individual; JOY WHITTLESEY, as GUARDIAN of and for ELAINE AUDWIN TIFFANY; MATTHEW HECKEL, an individual; MARGARET HECKEL, an individual; and SALLY CLARK, ADMINISTRATRIX of the ESTATE of JOHN DAVID HECKEL, DECEASED,

Defendants.

ENTERED ON DOCKET
DATE DEC 23 1999

Case No. 99-CV-0653-E (J)

FILED
DEC 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED INTERPLEADER ORDER OF DISCHARGE AND JOURNAL ENTRY OF JUDGMENT

Now on this 23rd day of December, 1999, the Agreed Interpleader Order of Discharge and Journal Entry of Judgment submitted by the parties herein comes before the Court.

The Court, noting the agreed nature of the submission, and otherwise being fully advised in the premises, finds and rules as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. BOk is a national banking association organized under the National Bank Act, with its principal place of business in Tulsa, Oklahoma.

2. Defendant Elaine Audwin Tiffany ("Tiffany"), is an incompetent individual and a citizen of the State of Oklahoma. Defendant Tiffany is currently incarcerated in the Mabel Bassett Correctional Center in Oklahoma City, Oklahoma. Immediately prior to his death, Decedent John David Heckel ("Decedent"), was married to Defendant Tiffany and was a citizen of the State of Oklahoma and a resident of Tulsa, Oklahoma.

3. Defendant Joy Whittlesey ("Whittlesey"), is the duly appointed guardian of and for

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the estate of Defendant Tiffany by order of the court in that certain action styled In the Matter of the Guardianship of Elaine A. Tiffany, an incompetent person, District Court, Probate Division, Tulsa County, Oklahoma, Case No. PG-98-166. Defendant Whittlesey is a citizen of the State of Oklahoma and a resident of Tulsa, Oklahoma.

4. Defendant Matthew Heckel is a citizen of the State of Oklahoma and a resident of Tulsa, Oklahoma. Defendant Matthew Heckel is the Decedent's only child and the Decedent's only descendant, and is not related to Defendant Tiffany. Decedent never adopted any of Ms. Tiffany's children.

5. Defendant Margaret Heckel is a citizen of the State of Oklahoma and a resident of Tulsa, Oklahoma. Defendant Margaret Heckel is the Decedent's mother. The Decedent's father predeceased the Decedent.

6. Defendant Sally Clark ("Clark"), is a citizen of the State of Oklahoma and a resident of Tulsa, Oklahoma. Defendant Clark is also the Administratrix of the Estate of Decedent in that certain probate action styled In the Matter of the Estate of John David Heckel, Deceased, District Court, Probate Division, Tulsa County, Oklahoma, Case No. P-98-277. Decedent died on March 29, 1998. By May 20, 1998 Order therein, Judge Edward J. Hicks, III, determined that Decedent's sole and only heirs at law are Defendant Tiffany and Defendant Matthew Heckel.

7. This is a civil action in interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure, which was filed by BOk on August 9, 1999. This Court has jurisdiction over the parties to, and over the subject matter of, this action pursuant to 29 U.S.C. §§ 1132(a), 1132(e)(1), and 1132(f) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), and 28 U.S.C. § 1331. Venue is proper in this Court pursuant to 29 U.S.C. §§ 1132(e)(2) of ERISA, and 28 U.S.C. § 1391(b).

8. BOk is the duly authorized Trustee of the World Publishing Company 401K Plan (the "Plan"). The Plan is an employee pension benefit plan within the meaning of 29 U.S.C. § 1002(2)(A) of ERISA. BOk is a fiduciary with respect to the Plan within the meaning of 29

U.S.C. § 1002(21)(A) of ERISA.

9. World Publishing Company ("World Publishing"), is an Oklahoma corporation with its principal place of business located in Tulsa, Oklahoma. World Publishing Company is the sponsor of the Plan. Decedent was an employee of World Publishing and a participant in the Plan at the time of his death on March 28, 1998.

10. Decedent, by a duly executed Beneficiary Designation Form dated June 15, 1995, designated Defendant Tiffany as his primary beneficiary under the Plan. Decedent did not designate a contingent beneficiary in the event that Defendant Tiffany predeceased Decedent or was otherwise ineligible to receive Decedent's interest in the Plan.

11. Section 8.02 of the Plan provides for the distribution of a Plan interest if the Plan participant fails to designate a beneficiary or the designated beneficiary (and any designated contingent beneficiary) is ineligible to receive the Plan interest, as follows, in pertinent part:

> 8.02 NO BENEFICIARY DESIGNATION/DEATH OF BENEFICIARY. If a Participant fails to name a Beneficiary in accordance with Section 8.01, or if the Beneficiary named by a Participant predeceases him, then the Trustee will pay the Participant's Nonforfeitable Accrued Benefit in accordance with Section 6.02 in the following order of priority....:
>
> (a) The Participant's surviving spouse;
>
> (b) The Participant's surviving children, including adopted children, in equal shares;
>
> (c) The Participant's surviving parents, in equal shares; or
>
> (d) The Participant's estate.

12. Defendant Tiffany, in Tulsa County District Court on or about November 9, 1998, having previously entered a plea of *nolo contendere*, was convicted of first degree murder in connection with Decedent's death, and was sentenced to a term of life in prison, under the custody and control of the Oklahoma Department of Corrections.

13. Defendant Matthew Heckel has made claim upon World Publishing for the Decedent's accrued benefits under the Plan at the time of Decedent's death, pursuant to 84 O.S. § 231 (which is commonly referred to as Oklahoma's "Slayer Statute").

14. Defendant Clark has made a similar claim.

15. Defendant Whittlesey, as the duly appointed guardian of and for the estate of Defendant Tiffany, through counsel and for and on behalf of Defendant Tiffany, made a June 29, 1999 claim upon BOk's counsel for the Decedent's accrued benefits under the Plan at the time of Decedent's death.

16. Defendant Margaret Heckel is a potential claimant to the Decedent's accrued benefits under the Plan at the time of Decedent's death pursuant to Section 8.02(c) of the Plan.

17. By reason of:

(a) the nature of the Decedent's death;

(b) the actual and potential conflicting claims of the Defendants;

(c) the lack of authority on the issue of whether 84 O.S. § 231 is preempted by ERISA;

(d) the lack of any specific provision of ERISA or the Plan addressing the instant situation; and

(e) the existence of non-controlling federal common law in accord with 84 O.S. § 231 from other jurisdictions, but the lack of controlling, 10th Circuit federal common law in accord with 84 O.S. § 231,

BOk filed this action in good faith doubt and could not safely make a disbursement or disbursements of the Decedent's accrued benefits under the Plan at the time of his death to any of the Defendants without assuming the responsibility of determining issues of fact and law, without incurring the risk of being subjected to the cost and expense of defending itself in multiple suits, and without subjecting itself to the possibility of double or multiple liability.

18. BOk is ultimately obligated to disburse all or part of Decedent's accrued benefits under the Plan at the time of his death, which have a current value of approximately $18,000.00 (the "Plan Stake"), to or among one or more of the Defendants.

19. BOk has been compelled to employ counsel and pay court costs of $150.00 and reasonable attorney's fees in excess of $3,000.00 for the purpose of protecting its and World Publishing's interests arising out of the aforementioned claims. BOk is entitled to some compensation for its court costs and reasonable attorney's fees arising from this interpleader action

by virtue of 29 U.S.C. § 1132(g)(1) of ERISA, the interpleader common law of this Circuit, see, e.g., TransAmerica Premier Ins. Co. v. Growney, 70 F.3d 123 (10th Cir. 1995) (Table, text in Westlaw), and Rule 54 of the Federal Rules of Civil Procedure.

20. BOk is merely a stakeholder and has no interest in this controversy or the Plan Stake, except insofar as BOk is entitled to some compensation for its court costs and reasonable attorney's fees arising from this action by virtue of 29 U.S.C. § 1132(g)(1) of ERISA, the interpleader common law of this Circuit, see, e.g., TransAmerica Premier Ins. Co. v. Growney, 70 F.3d 123 (10th Cir. 1995) (Table, text in Westlaw), and Rule 54 of the Federal Rules of Civil Procedure. All other parties to this action should bear their own costs and attorney's fees incurred in connection with this action, under the facts and circumstances of this case.

21. The Plan Stake is currently subject to the authority and control of BOk. BOk has agreed to liquidate, tender and deposit the Plan Stake into the registry of this Court, to be paid to one or more of the Defendants\claimants who might ultimately be adjudged by the Court to be entitled thereto, or otherwise distribute the Plan Stake pursuant to the Order of this Court.

22. On October 19, 1999, Defendant Whittlesey, as Guardian of and for the Estate of Defendant Tiffany, an incompetent individual, filed her Disclaimer of Interest with respect to the Plan Stake on behalf of Defendant Tiffany herein and pursuant to order of the court in that certain action styled In the Matter of the Guardianship of Elaine A. Tiffany, an incompetent person, District Court, Probate Division, Tulsa County, Oklahoma, Case No. PG-98-166. Defendants Whittlesey and Tiffany are thus entitled to be discharged from this action.

23. On November 9, 1999, Defendant Clark, as the Administratrix of the Estate of the Decedent, filed her Disclaimer of Interest with respect to the Plan Stake on behalf of the Decedent's Estate herein and pursuant to order of the court in that certain probate action styled In the Matter of the Estate of John David Heckel, Deceased, District Court, Probate Division, Tulsa County, Oklahoma, Case No. P-98-277. Defendant Clark is thus entitled to be discharged from this action.

24. On November 9, 1999, Defendant Margaret Heckel filed her Disclaimer of Interest

with respect to the Plan Stake herein. Defendant Margaret Heckel is thus entitled to be discharged from this action.

25. The only claimant to the Plan Stake who has not filed a disclaimer of interest with respect to the Plan Stake herein is Defendant Matthew Heckel. Defendant Matthew Heckel is therefore legally entitled to the Plan Stake and judgment thereon.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant Whittlesey, as Guardian of and for the Estate of Defendant Tiffany, an incompetent individual, Defendant Clark, as the Administratrix of the Estate of the Decedent, and Defendant Margaret Heckel, having filed Disclaimers of Interest with respect to the Plan Stake herein, are not entitled to any portion of the Plan Stake, and should be and hereby are discharged from this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Matthew Heckel is legally entitled to the Plan Stake and judgment should be and hereby is rendered thereon by this Court in favor of Defendant Matthew Heckel.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that since BOk has no beneficial interest in the Plan Stake, BOk shall, within twenty (20) business days after this Agreed Interpleader Order of Discharge and Journal Entry of Judgment is filed, close and liquidate the Decedent's Plan account, and distribute the Plan Stake, i.e., the entire proceeds of said account representing Decedent's accrued benefits under the Plan at the time of his death, with accrued interest, if any, as follows: (i) the sum of $1,650.00 to BOk as awarded hereinbelow; and (ii) the remainder thereof to Defendant Matthew Heckel.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon BOk's distribution of the entire Plan Stake with accrued interest, if any, as ordered hereinabove, BOk shall be forever discharged from this action and from any and all liability in contract, tort, or otherwise, with respect to the Plan Stake, the Plan, Decedent's participation in the Plan, and any and all liability to and actual and potential claims of the Defendants in connection therewith.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that BOk is awarded reasonable attorney's fees in the amount of $1,500.00, and court costs in the amount of $150.00,

arising from this action, payable from the Plan Stake. BOk is hereby authorized to deduct and retain $1,650.00, that being the sum of the attorney's fees and court costs awarded by this judgment, from the entire Plan Stake with accrued interest, if any, prior to distributing the remainder thereof, with accrued interest, if any, as ordered hereinabove.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all other parties to this action shall bear their own costs and attorney's fees incurred in connection with this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon BOk's distribution of the entire Plan Stake with accrued interest, if any, as ordered hereinabove, Defendants shall be permanently restrained and enjoined from instituting or prosecuting any suit or proceeding against BOk regarding, affecting, or concerning the Plan Stake, the Plan, Decedent's participation in the Plan, and any and all liability to and actual or potential claims of the Defendants in connection therewith.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that this judgment shall be a final judgment, as it adjudicates all claims of all parties to this action.

DATED this 23rd Day of December, 1999.

THE HONORABLE JAMES O. ELLISON
UNITED STATES DISTRICT COURT JUDGE

RESPECTFULLY SUBMITTED AND AGREED AS TO FORM AND CONTENT, BY:

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Paul DeMuro, OBA # 17605
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Joy Whittlesey, Guardian of and for
the Estate of Defendant Elaine A. Tiffany,
an incompetent individual, one and the same
as Elaine Audwin Tiffany

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES and PHYLLIS GATEWOOD, Individually, and as Parents and Natural Guardians of DAVID GATEWOOD, a Minor Child,	
Plaintiffs,	
v.	**Case No. 99 CV 0258 B (E)**
WYANDOTTE PUBLIC SCHOOLS,	
Defendant.	

FILED
DEC 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 12/23/99

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiffs, James and Phyllis Gatewood, individually and as parents and natural guardians of David Gatewood, a minor child, and the defendant, Independent School District No. 1 of Ottawa County, Oklahoma, a/k/a the Wyandotte Public Schools (the "Wyandotte School District"), advise the court of a settlement agreement reached between the parties and, pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiffs' action against the defendant, the Wyandotte School District, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 23rd day of December, 1999.

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA LITTLEJOHN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-CV-754K (M)
	)	
AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,	)	
	)	
Defendant.	)	

FILED
DEC 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE DEC 23 1999

ORDER ACKNOWLEDGING
SITPULATION TO DISMISS WITH PREJUDICE

Plaintiff, Linda Littlejohn, and Defendant, American National Property and Casualty Company, hereby stipulate under Federal Rule of Civil Procedure 41 to dismissal of this action with prejudice.

DATED this 21 day of December, 1999.

Judge, U. S. District Court

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLARD T. COLE,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 93-C-571-K**
	)	
KENNETH S. APFEL, Commissioner of Social Security Administration,	)	
	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE DEC 23 1999

ORDER

On May 15, 1999, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for an award of benefits. **No appeal was taken from this Judgment and the same is now final.**

Pursuant to plaintiff's motion for attorney fees under 42 U.S.C. § 406, filed on or around December 6, 1999, the parties have stipulated that an award in the amount of $3,048.00 for attorney fees for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of $3,048.00 under 42 U.S.C. § 406(b)(1), and that plaintiff's counsel shall refund the small award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986).

TERRY C. KERN
United States District Judge

23

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

for Loretta F. Radford

PETER BERNHARDT, OBA #741
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRYSTAL STAR PHILLIPS, individually, and as next of kin to Martin Shane Phillips, on behalf of THE ESTATE OF MARTIN SHANE PHILLIPS, by and through her mother, legal guardian, and next friend, MINNIE CHRISTINA DACZEWITZ, and FRED MARTIN PHILLIPS, JR., parent of Martin Shane Phillips,	)	ENTERED ON DOCKET DATE DEC 23 1999
Plaintiffs,	)	
v.	)	98-CV-829-H ✓
HILLCREST MEDICAL CENTER, an Oklahoma corporation doing business in the State of Oklahoma, CAROLYN COBB, a physician, and TULSA EMERGENCY PHYSICIANS, INC., an Oklahoma corporation doing business in the State of Oklahoma,	)	FILED DEC 22 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

JUDGMENT

This matter came before the Court for a trial by jury from December 13 through December 17, 1999. At the close of Plaintiffs' case-in-chief, the Court granted Defendants' motion for judgment as a matter of law on Plaintiffs' claim for a violation of the Emergency Medical Treatment and Active Labor Act (EMTALA). On December 17, 1999, the jury returned its verdict, finding that Plaintiffs had failed to prove their claims of negligence against Defendants.

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IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants Hillcrest Medical Center, Dr. Carolyn Cobb, and Tulsa Emergency Physicians, Inc. and against Plaintiffs.

IT IS SO ORDERED.

This 21st day of December, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D
DEC 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ERMA L. McCOY,
447-40-1450

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-931-M

ENTERED ON DOCKET
DATE DEC 23 1999

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this 22nd Day of December, 1999.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 22 1999
Clerk
COURT

ERMA L. McCOY,
447-40-1450

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-931-M

ENTERED ON DOCKET
DATE DEC 23 1999

ORDER

Plaintiff, Erma L. McCoy, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

[1] Plaintiff's October 20, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held February 12, 1996. By decision dated April 19, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 30, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born July 6, 1942, and was 53 years old at the time of the hearing. She has a General Equivalency Diploma and vocational training as a welder. She has formerly worked as a welder. She claims to have been unable to work since July 30, 1993, as a result of pain in her left knee and back, headaches and depression. The ALJ determined that although Plaintiff cannot return to her past relevant work at the medium exertional level, she is capable of performing light work with some limitations. Based on the testimony of a vocational expert, the ALJ found that there are a significant number of jobs in the national economy that Plaintiff could perform with her limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to give appropriate weight to reports from her treating physicians; (2) failed to perform a proper analysis

of her subjective complaints; and (3) failed to make required findings as to the transferability of skills as required by the regulations. For the reasons expressed below, the Court holds that the case must be reversed and remanded.

The record contains widely conflicting medical evidence. As noted by the ALJ, x-ray and MRI reports concerning Plaintiff's knee were normal. On examination, orthopedist, Terrill Simmons, M.D., found that Plaintiff had good motion of her left knee and considered it stable in October 1993. [R. 149]. In November 1993, orthopedic surgeon, J.M. Bazih, M.D., evaluated Plaintiff's back and found that although x-ray revealed some degenerative changes in the cervical and lumbar areas, Plaintiff had fairly good range of motion in the lumbar and cervical areas with no localized tenderness, paraspinal muscle spasm, or atrophy. [R. 171]. In June 1994, Plaintiff was examined by Allan Fielding, M.D., a neurological surgeon, who reported some reflex deficits but found that Plaintiff's complaints of pain were out of proportion to her normal examination. [R. 196]. And, in December 1994, a consultative examiner found that Plaintiff's range of motion and strength were essentially normal but remarked that she exhibited "very exaggerated behavior" during his examination. [R. 204]. This evidence tends to weigh against a finding of disability.

However, the record also contains considerable evidence tending to weigh in favor of a finding of disability, in favor of the treating physician's opinion that Plaintiff is unable to work, and in favor of a finding that Plaintiff's complaints of pain were credible.

The record contains the treatment notes of Plaintiff's treating physician, Gary R. Davis, M.D., who treated Plaintiff from February 1, 1994 through October 12, 1995. Throughout that time Dr. Davis saw Plaintiff at least monthly and often weekly for her complaints of headaches, low back and knee pain. Dr. Davis often notes back spasms, positive straight leg raising test, reduced range of motion, and edema and tenderness of Plaintiff's knee. [R. 315-339]. The record also contains pharmacy records dating from August 1993 through December 1995. These records reflect frequent refills for prescription pain medications such as: Inderal (used for treatment of hypertension and prophylaxis of migraine headaches); Lortab and Vicodin (narcotic analgesics); and Ultram (analgesic used for management of moderate of moderately severe pain). *Physicians Desk Reference* 53rd Edition. In addition the record includes a volume of physical therapy records documenting Plaintiff's lack of progress despite receiving physical therapy several times per week from August 1994 through January 1995. [R. 281-289; 300-311].

The ALJ gave "little evidentiary weight" to Dr. Davis's opinion that Plaintiff could not perform even sedentary work in part because the ALJ found that Dr. Davis's opinion conflicted with his own clinical findings. [R. 21-22]. To substantiate this finding the ALJ refers to his discussion of Exhibit 28, but all the ALJ says with regard to that exhibit is:

> The remainder of the record shows the claimant has been treated with conservative medical therapy and physical therapy by other treating physicians (non-specials, e.g., internists, general practitioners, etc.)(Exhibits 16, 17, 22,

and 28). This includes treatment for the claimant's migraine headaches.

[R. 19-20]. In fact, some of Dr. Davis's records support his opinion. However, the ALJ's discussion of Dr. Davis's records does not illuminate his conclusion and is not sufficient to enable the court to determine whether the conclusion is supported by substantial evidence. Consequently the case must be remanded. *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984) (ALJ must give specific, legitimate reasons for rejecting a treating physician's opinion).

In addition, the court finds that the ALJ's credibility analysis is not supported by substantial evidence. The ALJ stated: "The claimant is taking no prescribed medications for any medical condition, including hypertension." [R. 22]. That statement is not supported by the medical record.

This case is REVERSED and REMANDED for a proper credibility evaluation and for further evaluation in light of the treating physician's records. In remanding this case, the Court does not dictate the result. Remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995).

SO ORDERED this 22nd Day of December, 1999.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IMT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 21 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

EMMET WALLACE, MARY BELLE WALLACE, SUE ANN GRATTOP, Individually and as Representative of the Estate of ALBERT GRATTOP, Deceased, EVELYN HART, Individually and as Representative of the Estate of WILLIE HART, Deceased	)
Plaintiffs,	)
vs.	) Case No. 99-CV-244-HM
ALLIED CHEMICAL CORPORATION, ASHLAND NC. (a/k/a ASHLAND OIL, INC.), SHELL CHEMICAL COMPANY SHELL OIL COMPANY, TURCO PRODUCTS, INC., UNIVAR CORPORATION, MONSANTO COMPANY and UNION CARBIDE CORPORATION,	)
Defendants.	)

ENTERED ON DOCKET
DATE DEC 23 1999

STIPULATION FOR ORDER OF DISMISSAL

Come now the parties, by and through their attorneys of record, and stipulate that the Court may enter an Order dismissing the above-styled plaintiffs with prejudice to the filing of any future action.

Respectfully submitted,

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and

Mail Cpy retd
O/J

10

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ATTORNEYS FOR DEFENDANT TURCO PRODUCTS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA LITTLEJOHN,

Plaintiff,

vs.

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,

Defendant.

Case No. 99-CV-754K (M)

ENTERED ON DOCKET

DATE DEC 23 1999

STIPULATION TO DISMISS WITH PREJUDICE

Plaintiff, Linda Littlejohn, and Defendant, American National Property and Casualty Company, hereby stipulate under Federal Rule of Civil Procedure 41 to dismissal of this action with prejudice. Each party has agreed to bear its own costs and attorney fees and to not attempt to shift the burden of such costs and fees to the opposing party through the federal rules of civil procedure, or through state of federal cost or fee shifting laws.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES and PHYLLIS GATEWOOD, Individually, and as Parents and Natural Guardians of DAVID GATEWOOD, a Minor Child,

Plaintiffs,

v.

WYANDOTTE PUBLIC SCHOOLS,

Defendant.

FILED
DEC 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99 CV 0258 B (E)

ENTERED ON DOCKET
DATE DEC 28 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiffs, James and Phyllis Gatewood, individually and as parents and natural guardians of David Gatewood, a minor child, and the defendant, Independent School District No. 1 of Ottawa County, Oklahoma, a/k/a the Wyandotte Public Schools (the "Wyandotte School District"), advise the court of a settlement agreement reached between the parties and, pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiffs' action against the defendant, the Wyandotte School District, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 23rd day of December, 1999.

Kort A. BeSore, OBA #014674
Nicholas P. Lelecas, OBA #017886
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Attorneys for Plaintiffs

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Attorneys for Defendant

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHLEEN DONICA,

Plaintiff,

vs.

HEALTHSOUTH CORPORATION, a Delaware corporation,

Defendant.

Case No. 98-CV-0439H(M)

ENTERED ON DOCKET

DATE DEC 23 1999

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF CHRISTOPHER ZAMBONI

Opt-In Plaintiff Christopher W. Zamboni ("Zamboni") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(*i*), hereby stipulate to the dismissal without prejudice of Zamboni's claims against HealthSouth in this matter, and Zamboni by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,

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Attorneys for the Plaintiff,
KATHLEEN DONICA and those other present and former employees of HealthSouth Corporation who are similarly situated

-AND-

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-and-

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Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHLEEN DONICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 98-CV-0439H(M)
	)	
HEALTHSOUTH CORPORATION, a Delaware corporation,	)	ENTERED ON DOCKET
	)	DATE DEC 23 1999
Defendant.	)	

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF LAURIE WALLACE

Opt-In Plaintiff Laurie Wallace ("Wallace") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(*i*), hereby stipulate to the dismissal without prejudice of Wallace's claims against HealthSouth in this matter, and Wallace, by this dismissal, effectively withdraws her name from the class in this case.

Respectfully submitted,

J. Ronald Petrikin, OBA No. 7092
David H. Herrold, OBA No. 17053
CONNER & WINTERS, P.C.
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-and-

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Attorneys for the Plaintiff, KATHLEEN DONICA and those other present and former employees of HealthSouth Corporation who are similarly situated

-AND-

mail copy to cf

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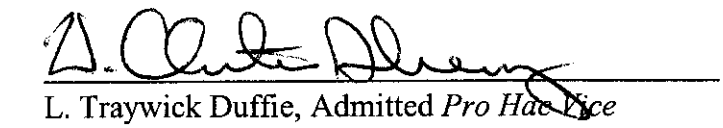

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Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRY RAY VENABLE,
SSN: 441-58-0576,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 98-CV-701-M

ENTERED ON DOCKET
DEC 23 1999
DATE

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 21ST day of Dec, 1999.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 21 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRY RAY VENABLE,
441-58-0576

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-701-M

ENTERED ON DOCKET
DATE DEC 23 1999

ORDER

Plaintiff, Terry Ray Venable, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

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[1] Plaintiff's January 22, 1996, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held May 21, 1997. By decision dated August 22, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 17, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born June 11, 1958, and was 38 years old at the time of the administrative hearing. He has a high school education and vocational training. He formerly worked as a carpenter, boiler and turbine operator, electrical repair, and stationary engineer. He claims to have been unable to work since July 22, 1995, as a result of back and hip pain. The ALJ determined that although Plaintiff is unable to perform his past relevant work, he has the residual functional capacity (RFC) to perform at least sedentary work. Relying on Section 404.1569 of Appendix 2, Subpart P, Regulations No. 4, the ALJ determined there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to give the treating

physician's report appropriate weight; (2) improperly evaluated Plaintiff's complaints of pain; and (3) failed to properly develop the record. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

Plaintiff's treating physician, Dr. Lewis, wrote a letter dated May 15, 1997, expressing the opinion that Plaintiff is "virtually incapacitated." [R. 186]. It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984). In accordance with these authorities, the ALJ thoroughly discussed the deficiencies in Dr. Lewis' opinion and properly rejected the opinion upon finding that it rested heavily on the patient's subjective statements and was "not substantiated either by his own records or by the other medical evidence." [R. 15].

Plaintiff claims that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Commissioner is entitled to examine the

medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The court finds that the ALJ appropriately evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the legal standards established by the Commissioner and the courts.

The ALJ has a basic obligation in every case to ensure that an adequate record is developed, consistent with the issues raised. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992), *Henrie v. U.S. Dept. of Health and Human Services*, 13 F.3d 359, 360-1 (10th Cir. 1993). The court rejects Plaintiff's argument that the consultative examiner was required to obtain x-rays, a ct scan, or an MRI.

The court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED

SO ORDERED this 21ST Day of December, 1999.

Frank H. McCarthy
Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARNES BROTHERS CONSTRUCTION COMPANY, an Oklahoma corporation,

Plaintiff,

vs.

BOSTON FINANCIAL TAX CREDIT FUND PLUS, a Limited Partnership, a Massachusetts Limited Partnership; FLEET INVESTMENT ADVISORS, INC., a Rhode Island corporation,

Defendants.

Case No. 99CV0743BU(M)

ENTERED ON DOCKET
DEC 22 1999

NOTICE OF DISMISSAL WITH PREJUDICE

The Plaintiff hereby dismisses the above styled and numbered cause of action with prejudice to future filings.

Respectfully submitted,

EDWARDS & HUFFMAN, L.L.P.

By: /s/ Rodney A. Edwards

Rodney A. Edwards, OBA #2696
Robert A. Huffman, Jr., OBA #4456
Two Warren Place
6120 S. Yale, Suite 1470
Tulsa, OK 74136-4223
(918) 496-0444

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of December, 1999, I caused a true and correct copy of the above and foregoing instrument to be mailed with proper postage thereon prepaid to Tim Kline, Kline & Kline, 720 N.S. 63rd Street, Oklahoma City, Oklahoma 73105.

Rodney A. Edwards

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FILED

DEC 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BERL AND DONNA HART, as parents and next friend of LINDSEY HART, a minor child,

Plaintiffs,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 5 of Tulsa County, Oklahoma, and KATHRYN MCGREW, in her individual and official capacity, and ANGELA DUNN in her individual and official capacity, and CHERYL KELSEY in her individual and official capacity, and DR. KIRBY LEHMAN in his individual and official capacity,

Defendants.

No. 99-C-074-B(M)

ENTERED ON DOCKET

DATE DEC 22 1999

ORDER

The Court has for consideration Defendants' Motion to Dismiss (Docket #5) and the Court finds as follows:

Defendants, Independent School District No. 5 ("Jenks"), Kathryn McGrew, Angela Dunn, Cheryl Kelsey, and Dr. Kirby Lehman (collectively "School District Defendants") move to dismiss the Plaintiffs' ("Harts") 42 U.S.C. § 1983 claims pursuant to Fed.R.Civ.Pro. 12(b)(6) for failure to state a claim upon which relief can be

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granted. The Harts challenge School District Defendants' assigning Lindsey Hart, an 8th grade student of the Jenks School District, to an in-school intervention program after she was found to be in possession of a dangerous weapon while on school grounds. Plaintiffs allege deprivation of property and liberty interests by School District in violation of the Fourteenth Amendment. Plaintiffs also seek a finding by this Court that Okla. Stat. tit. 70, § 24-101.3 (1998 Supp.) is unconstitutional.[1] School District Defendants request the Court consider this motion as a motion for summary judgment pursuant to Fed.R.Civ.Pro. 56 because Defendants submit matters outside the pleadings in support of their motion, which this Court finds to be appropriate.

The Court *sua sponte* initially ordered Plaintiffs to amend their response brief for failure to comply with N.D. LR 56.1(B). The Amended Response also failed to comply with the stated rule and the Court, based upon the strong preference against default judgments, once again gave Plaintiffs the opportunity to resubmit their response in proper form. During the extended briefing time, the parties have had ample opportunity to conduct any necessary discovery. The Second Amended Response Brief complies with the local rule and the case is ripe for adjudication on summary judgment.

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[1]A minute order was entered by the Court on may 24, 1999, advising the Attorney General of the State of Oklahoma of the constitutional challenge as required by Fed. R.Civ. Pro. 24(C) and N.D. LR 24.1. On June 18, 1999, the Attorney General filed a response declining to intervene on the basis that Defendants' interests were not in conflict with the interests of the state and that it appeared Defendants were represented by competent counsel. Defendants are directed to forward a copy of this Order to the office of the Attorney General upon receipt of same.

Defendants submit three propositions in support of summary judgment. First, Defendants state Plaintiffs have failed to identify any deprivation of property protected by the Fourteenth Amendment. Second, Defendants assert Lindsey Hart has not been deprived of any constitutionally-protected liberty interest. Finally, Defendants urge the failure to identify either a property or liberty interest which has been infringed leaves Plaintiffs' substantive due process claim with no more merit than their procedural due process claim.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom

must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Undisputed Material Facts

A review of the record submitted by both parties in support of their respective statements of material facts establishes the following as the facts which are material and undisputed for the purpose of deciding the issues:

1. During the 1998-99 school year, Lindsey Hart was an eighth grade student enrolled in the Jenks School District and attending the Seventh and Eighth Grade Center, a school operated by the Jenks School District.

2. On Friday, November 6, 1998, Clay Overcash, a teacher assistant at the Seventh and Eighth Grade Center, observed a group of students standing in the hall talking. One of the students, Lindsey Hart, was holding a wire ("wire") approximately 21 inches long with finger rings attached at both ends. Overcash, a former police officer, took the wire, which he identified as a garrote or choking devise, from Lindsey and brought it to the principal's office.

3. Campus Police Officer Perry Marler was in the administrative offices when Overcash arrived with the wire. Officer Marler took possession of the wire and took it to his boss who confirmed the opinion that it was a weapon. The Tulsa County District Attorney subsequently initiated juvenile proceedings against Lindsey as a result of her possession of the wire at school.

4. Assistant Principal Angela Dunn interviewed Lindsey about her possession of the wire. Lindsey said that another student had the wire, that she had asked to see it and kept it. Because Lindsey admitted having possession of the wire at school even though Lindsey did not appear to consider it a weapon, Dunn determined to suspend Lindsey out of school. Effective November 9, 1998, pursuant to the Jenks School District's Student Behavior Policy. Dunn contacted Lindsey's parents and scheduled a meeting with them

for the following Monday, the first day Lindsey's suspension out of school was to go into effect.

5. The Jenks School District's Middle School Student Handbook sets forth the Jenks School District's Student Behavior Policy. This policy provides that a student will be disciplined, which may include in-school placement options or out-of-school suspension, for "possession, threat, or use of a dangerous weapon and related instrumentalities." Lindsey acknowledged receiving a copy of the Middle School Student Handbook at the start of the 1998-99 school year.

6. On Monday, November 9, 1998, Angela Dunn advised Lindsey's parents that Lindsey was suspended out of school for the remainder of the current semester and through March 29, 1999, for possession of a dangerous weapon on school grounds. Dunn advised the parents of their appeal rights and the parents advised they wished to appeal. Lindsey was placed in the in-school intervention program at the Seventh and Eighth Grade Center pending the appeal.

7. On November 18, 1998, a building-level suspension review committee met and considered Lindsy's appeal. The committee consisted of Mike Walker, an Assistant Principal at the High School, and two teachers from the Seventh and Eighth Grade Center. After hearing the evidence, the committee modified Lindsey's out-of-school suspension from suspension through March 29, 1999, to suspension through February 13, 1999. Lindsey's parents appealed this to the district-level suspension review.

8. On December 2, 1998, a district-level suspension review committee met and considered the appeal. The committee consisted of Dr. Don Decker, Assistant Superintendent of the Jenks School District, Cheryl Kelsey, Assistant Superintendent of the Jenks School District, and Roger Wright, Director of Community Education for the Jenks School District. After hearing the evidence, the committee upheld the out-of-school suspension as modified by the building-level suspension review committee. The Hart's appealed this decision to the Jenks School District Board of Education.

9 The Student Behavior Policy set forth in the Middle School Student Handbook identifies three different disciplinary options: detention, alternate in-school placement, and out-of-school suspension. The Handbook defines alternate in-school placement as follows:

> Alternative in-school placement is an optional correctional measure that may be used by the school when deemed appropriate. It involves assignment to a school site, designated by the school, for a prescribed course of education as determined by school representatives.

The Handbook also specifically states, in capital letters, that no due process rights are implicated when a student is placed in detention or alternative in-school placement:

> ALTERNATIVE IN-SCHOOL PLACEMENT, DETENTION, AND SIMILAR DISCIPLINARY OPTIONS OR CORRECTIONAL MEASURES ARE NOT CONSIDERED BY LAW TO BE OUT-OF-SCHOOL SUSPENSION AND DO NOT REQUIRE OR INVOLVE THE DUE PROCESS PROCEDURES SET FORTH HEREIN.

10. On December 11, 1998, counsel for the Jenks School District advised Plaintiffs' counsel that Dr. Kirby Lehman, Superintendent of the Jenks School District,

had administratively modified Lindsey's discipline from an out-of-school suspension through February 13, 1999, to placement in the in-school intervention program through the same date. Plaintiffs were advised that under Oklahoma law and Jenks School District policy, placement in the in-school intervention program was not an out-of school suspension and no right of appeal was provided from such placement. The appeals hearing scheduled for December 14, 1998 was canceled.

11. Lindsey was assigned to the in-school intervention program at the Seventh and Eighth Grade Center, the same school she had attended prior to November 9, 1998. Students assigned to that program are in the intervention classroom for the entire school day. They are supervised by a teacher assistant while performing assignments from their regular classroom teachers and may meet with their regular classroom teachers before school, during the teacher's preparation period, or after school. During the time Lindsey was in this program, she had the opportunity to attend school every day for the full school day, she was provided her scheduled assignments and tests by her regular classroom teachers and received academic credit for school work satisfactorily completed. She was not allowed to participate in group projects.

Arguments and Authority

The Court finds Plaintiff Lindsey Hart has not been deprived of any property or liberty protected by the Fourteenth Amendment as a result of her placement in the in-school intervention program.

The court of appeals has addressed the extent of constitutional protection afforded students in public school education in *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996). The court cites to and distinguishes the Supreme Court holding in *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), in which that Court ruled entitlement to a public education is a protected property interest where state law provides a public education to the citizens of that state. In *Seamons*, the Tenth Circuit interpreted *Goss* to reference the educational process generally as being entitled to constitutional protection and not the various separate component parts. In order to raise a constitutional claim, a plaintiff would necessarily be required to show they were deprived of the education process altogether.

The court of appeals had previously addressed a situation where a student was transferred for disciplinary reasons to a different, less desirable school in *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1980). In upholding summary judgment granted by the trial court in that case, the circuit court found Zamora was not separated from the educational process and was not deprived of an education. The same result must be reached in the case at bar.[2]

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[2]The Court notes Plaintiffs have offered no authority in their second amended response brief to counter that presented by School District Defendants and confirmed independently by the Court. Plaintiffs argument that the wire is not a garrote and was not intended by Lindsey Hart to be used as a dangerous weapon does not present a fact situation which distinguishes this case from the well established precedent regarding the authority a school district must have in regulating the safety of all its students.

The Court also finds there is no basis for finding Okla. Stat. tit. 70, § 24-101.3 (1998 Supp.) unconstitutional. The statute reads, in pertinent part:

> A. Any student who is guilty of an act described in paragraph 1 of subsection C of this section may be suspended out-of-school in accordance with the provisions of this section. Each school district board of education shall adopt a policy with procedures which provides for out-of-school suspension of students. The policy shall address the term of the out-of-school suspension, provide an appeals process as described in subsection B of this section, and provide that before a student is suspended out-of-school, *the school or district administration shall consider and apply, if appropriate, alternative in-school placement options that are not to be considered suspension, such as placement in an alternative school setting, reassignment to another classroom, or in-school detention.* The policy shall address education for students subject to the provisions of subsection D of this section and whether participation in extracurricular activities shall be permitted. (Emphasis added.)

In this case, Lindsey was placed in the in-school intervention program when the School District modified the original determination that out-of-school suspension was appropriate.

The constitutionality of a Texas statutory provision similar to the provision referenced above in italics was addressed by the Fifth Circuit Court of Appeals in *Nevares v. San Marcos Consolidated Independent School District*, 111 F.3d 25 (5th Cir. 1997), which arose from a fact situation analogous to the case at bar. *Nevares* involved placement of a student, who the school district had reason to believe had been involved in an aggrevated assault away from the school, in an alternative education program. Such a placement was authorized by Texas statute without providing any due process hearing. The fifth circuit affirmed the trial court's dismissal of the case on the basis that the

student was not denied access to public education but was merely transferred from one program to another. In reaching this decision, the fifth circuit relied upon tenth circuit authority previously cited herein.

Seamons, supra., is also dispositive of Plaintiffs' claim of deprivation of a liberty interest. Citing *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160-61, 47 L. Ed. 2d.405, 414 (1976), the circuit court concluded damage to reputation alone is insufficient to establish a due process violation.

Plaintiffs' substantive due process claims must also fail. No such claim may be brought in the absence of a protected property or liberty interest. *Sipes v. United States,* 744 F.2d 1418 (10th Cir. 1984).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is hereby granted. Plaintiffs shall take nothing on their claims. Costs are assessed against the Plaintiffs, upon timely application under N. D. LR 54.1, and the parties are to pay their respective attorney's fees.

DONE THIS 21ST DAY OF DECEMBER, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

BEVERLY TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 99-CV-0773-BU (J)**
	)	
COMMERCIAL FINANCIAL SERVICES, INC.,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE DEC 22 1999

STIPULATION OF DISMISSAL

COMES NOW Jeff Nix, counsel for Plaintiff, Beverly Taylor, and hereby dismisses without prejudice, the above styled cause.

Jeff Nix, OBA # 6688
Petroleum Club Building
601 South Boulder, Ste. 610
Tulsa, Oklahoma 74119
(918) 587-3193
(918) 587-3491 - fax

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 22 day of December, 1999, a true and correct copy of the above and foregoing document was mailed via U. S. Mail, with proper postage prepaid thereon to:

Kristen L. Brightmire
R. Charles Wilkin
Doerner, Saunders, Daniel
& Anderson, L. L. P.
320 S. Boston, Suite 500
Tulsa, Oklahoma 73103-3725

Jeff Nix OBA #6688

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 22 1999

TWIN CITY FIRE INSURANCE COMPANY,

Plaintiff,

v.

CHEROKEE NATION, *et al.*

Defendants.

Case No. 99 CV 0440 H (M)

FILED
DEC 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER
DISMISSING CERTAIN PARTIES
WITH PREJUDICE

UPON Third-Party Plaintiffs David Cornsilk and Marvin Summerfield's Motion to Dismiss With Prejudice Third-Party Defendants State Farm Fire and Casualty Company, State Farm General Insurance Company, United Services Automobile Association and Farmers Insurance Company, it is hereby

ORDERED that the above-identified Third-Party Defendants be dismissed, with prejudice.

DATED this 17th day of December, 1999.

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 20 1999

STEPHANIE LEWIS,)
)
Plaintiff,)
)
vs.)
)
AETNA U.S. HEALTHCARE, INC.)

Case No. 99-CV-0104H(M)

FILED
DEC 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

The Plaintiffs and Defendant Aetna Life Insurance Company, improperly pled as Aetna U.S. Healthcare, Inc., having compromised and settled all issues in the action and having stipulated that the Complaint and the action may be dismissed with prejudice, it is therefore,

ORDERED, that the Complaint and this cause of action are, by the Court, dismissed with prejudice to the bringing of another action upon the same cause or causes of action.

Entered this 17TH day of December, 1999.

UNITED STATES DISTRICT JUDGE

OKN-4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY)
)
LITIGATION (NO. VI))
)
_____)
)
This Document Relates To:)
)
~~United States District Court For The~~)
NORTHERN DISTRICT OF OKLAHOMA)
AT TULSA)
)
DEWEY GILLHAM)
4:98-291)

FILED
DEC 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. MDL 875

98-C-291-K

ENTERED ON DOCKET
DATE DEC 22 1999

STIPULATION OF DISMISSAL

COMES NOW plaintiffs herein, by and through their attorneys, and defends Babcock & Wilcox Company, by and through its attorneys, and stipulate and agree that the above-entitled causes have been fully compromised and settled as to Babcock & Wilcox Company only and the cases should be and hereby are dismissed as to defendant Babcock & Wilcox Company only with prejudice and the parties to bear own costs.

Mark H. Iola
UNGERMAN & IOLA
1323 E. 71st Street, Suite 300
Tulsa, Oklahoma 74136

ATTORNEY FOR PLAINTIFF

and

Thomas E. Rice, Jr.
James S. Kreamer

BAKER STERCHI COWDEN & RICE, L.L.C.
2100 Commerce Tower
Kansas City, MO 64199
516-471-2121
FAX (816) 472-0288

ATTORNEYS FOR DEFENDANT
THE BABCOCK & WILCOX COMPANY

IT IS SO ORDERED.

THE HONORABLE CHARLES R. WEINER

Dated: Dec 10, 1999

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAVID SACK, Plaintiff vs. RON CHAMPION, STEVE MOLE, DON COOK, JIM OWEN, GARY CARDINALE, DENNIS CUNNINGHAM, LARRY FIELDS, CAPITAL CORRECTIONAL RESOURCES, CHARLIE ARNOLD, JOHN DOE, JANE DOE, DR. DOE AND/OR NURSE DOE, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, Defendants.	§ § § § § § § § § § § § § § § §	ENTERED ON DOCKET DATE DEC 22 1999 NO. 96-C-203-H(M)

FILED
DEC 20 1999
U.S. DISTRICT COURT

ORDER

Upon the unopposed motion by the Plaintiff, David Sack, for an order dismissing with prejudice this cause of action in its entirety and with costs to be borne by the parties incurring same, the court finds that the motion should be, and is hereby, granted. All of Plaintiff's claims are hereby dismissed with prejudice. Each party shall bear their own costs of court. All relief not expressly granted herein is denied.

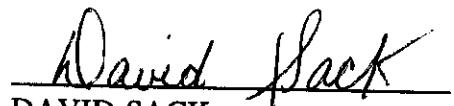
SO ORDERED.

SIGNED this 20TH day of DECEMBER, 1999.

UNITED STATES DISTRICT JUDGE

10

APPROVED AS TO FORM AND CONTENT:



DAVID SACK, pro se
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ATTORNEY *AD LITEM* FOR PLAINTIFF DAVID SACK

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAY A. LARGE,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

No. 97-CV-325-J

ENTERED ON DOCKET
DATE DEC 22 1999

ORDER

Now before the Court is Plaintiff's Motion for an award of attorney's fees and other expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412. [Doc. No. 24-1]. Defendant filed a stipulation on December 16, 1999, agreeing to an award of attorneys fees to Plaintiff for $2,555.75 for fees incurred before the District Court, $3,384.25 for fees incurred before the Tenth Circuit Court of Appeals, and $149.11 in court costs, for a total fee award of $6,809.11. The Court therefore **GRANTS** Plaintiff's motion [Doc. No. 24-1] and awards Plaintiff's counsel $6,809.11 in attorneys fees and costs.

If attorneys fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, Plaintiff's counsel shall refund the smaller award to Plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

Dated this 20th day of December 1999.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELIZABETH JACKSON,

Plaintiff,

vs.

ERLANGER TUBULAR,

Defendant.

Case No. 99-CV-623-K(J)

ENTERED ON DOCKET
DEC 23 1999

REPORT AND RECOMMENDATION

Now before the Court is Plaintiff's *ex parte* "Application to File Derivative Action" and Plaintiff's "Application for Instructions From the Court." [Doc. Nos. 2 and 19]. Plaintiff's Application was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The undersigned offers this Report and recommends that Plaintiff's Application to File Derivative Action be **DENIED WITHOUT PREJUDICE.**

I. INTRODUCTION

On July 30, 1999, Plaintiff filed this case against Defendant, her former employer. Defendant has a collective bargaining agreement with the United Steel Worker's of America, Local 9368 ("the Union"). Plaintiff alleges in her Complaint that Defendant discharged her (1) on account of her disability in violation of the Americans with Disabilities Act and Title 25 of the Oklahoma Statutes, (2) in retaliation for her

union activities in violation of 29 U.S.C. § 157, and (3) in violation of Defendant's and the Union's collective bargaining agreement.

Although not specifically alleged by Plaintiff, it can be inferred from her pleadings, that after Defendant terminated her, Plaintiff filed a grievance with J.W. Flournoy, an "agent" of the Union. According to Plaintiff, Mr. Flournoy "wilfully and maliciously failed to prosecute Plaintiff's grievance in a manner that had even a remote chance of success." See Doc. No. 2, ¶ 6. Plaintiff has filed an Application for permission to join with her action against Defendant an action against J.W. Flournoy pursuant to 29 U.S.C. § 501(b). Section 501(b) authorizes civil lawsuits, in certain circumstances, against union officials who have violated their fiduciary duties to the Union as defined in § 501(a).

II. PLAINTIFF MAY JOIN A CLAIM AGAINST MR. FLOURNOY IN THIS CASE.

Plaintiff argues that either Fed. R. Civ. P. 18 or 19 permit her to join a claim against Mr. Flournoy with her claims against Defendant in this lawsuit. Plaintiff's reliance on Rules 18 and 19 is misplaced. Nevertheless, joinder of Plaintiff's claim against Mr. Flournoy is proper under Fed. R. Civ. P. 20(a).

Rule 18(a) would permit Plaintiff to join in this lawsuit as many claims as she has against Defendant, even if the individual claims are unrelated. Plaintiff seeks to add a claim against Mr. Flournoy, not an additional claim against Defendant. Consequently, Rule 18(a) does not apply.

Rule 19(a)(1) would permit Plaintiff to join a person whose presence in this lawsuit would be necessary to dispense complete relief between Plaintiff and Defendant. Mr. Flournoy's presence is not necessary to afford complete relief to Plaintiff and/or Defendant on Plaintiff's wrongful discharge claims. Thus, Rule 19(a)(1) does not apply. Rule 19(a)(2) would permit Plaintiff to join in this case any person who has an interest in the outcome of this litigation whose interest may (a) be impaired by the outcome of this litigation, or (b) subject either Plaintiff or Defendant to inconsistent or multiple liability. Mr. Flournoy has no interest in the outcome of Plaintiff's wrongful discharge claims against Defendant. Thus, Mr. Flournoy has no interest which would be impaired by the outcome of this litigation or which would subject either Plaintiff or Defendant to multiple or inconsistent liability in the future. Accordingly, Rule 19(a)(2) does not apply.

Rule 20(a), the permissive joinder rule, permits two parties to be joined as defendants in the same lawsuit if a claim arising out of the same transaction or occurrence, and raising common questions of law or fact, is asserted against them both. The undersigned finds that Plaintiff's claim against Defendant and Plaintiff's claim against Mr. Flournoy arise out of the same transaction or occurrence - Plaintiff's firing. The undersigned also finds that both claims present common questions of fact relating to the nature, timing and sequence of Plaintiff's firing. The undersigned finds, therefore, that if Plaintiff has a valid claim against Mr. Flournoy, she is entitled, under Rule 20(a), to join her claim against Mr. Flournoy with her claim against Defendant.

The undersigned notes, however, that Plaintiff's claims may be tried separately, if Judge Terry Kern, so determines. See Fed. R. Civ. P. 20(b).

III. PLAINTIFF HAS NOT PLEAD FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF UNDER 29 U.S.C. § 501(b).

Section 501 is part of the Labor-Management Reporting and Disclosure Act ("LMRDA"), also known as the Landrum-Griffin Act. Section 501 provides as follows:

> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.
>
> (b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or

> other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte.

29 U.S.C. § 501.

From its text, it is clear that Congress enacted § 501 to hold officers of labor organizations to the highest standards of responsibility and ethical conduct in the administration of internal union affairs. It is equally clear, however, that Congress also intended to protect union officials from unfair and harassing lawsuits. Section 501(b) imposes several requirements which must be met before a union member may maintain a lawsuit against a union official. Initially, a union member must seek leave of court, with a verified application, to file a lawsuit against a union member. Plaintiff has satisfied this initial requirement. Plaintiff has not, however, alleged facts sufficient to satisfy all of the other requirements imposed by § 501(b).[1/]

A. Officer, Agent, Shop Steward, or Representative

Section 501(b) authorizes suit against a union officer, agent, representative or shop steward who violates his fiduciary duty to the union as defined in § 501(a). Without further elaboration, Plaintiff has alleged that Mr. Flournoy is an "agent" of the Union. This allegation is marginally sufficient to satisfy § 501(b)'s first requirement

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[1/] The discussion which follows draws from the authorities cited in the following articles: Jay M. Zitter, Suits by Union Members Against Union Officers Under 29 USCS § 501(b), 114 A.L.R. Fed. 417 1993) (hereinafter Suits by Union Members); and Martha M. Cleary, Conduct of Union Officer Which Violates § 501(a) of Landrum-Griffin Act (29 USCS § 501(a)), 107 A.L.R. Fed. 448 (1992) (hereinafter Conduct of Union Officials)..

that the suit be brought against a union officer, agent, representative or shop steward.

B. THERE MUST BE A VIOLATION OF § 501(a).

Section 501(b) authorizes a civil lawsuit against a union officer to redress violations of the officer's fiduciary duties as defined in § 501(a). There is a split in the circuit courts of appeal regarding the scope of § 501(a). Some circuits, focusing on the second sentence of § 501(a), limit the duties imposed by § 501(a) to duties involving the use/misuse and management/mismanagement of union property. See Conduct of Union Officers, 107 A.L.R. Fed. at § 3 (citing authorities from the Second and Seventh Circuits). Other circuits, focusing on the first sentence of § 501(a), and viewing the second sentence as descriptive and not limiting, hold that § 501(a) imposes fiduciary duties on union officials even when no union property is involved. Id. at § 4 (citing authorities from the Third, Sixth, Eighth, and Ninth Circuits). The Tenth Circuit has yet to address the issue. The undersigned finds that the Court need not resolve the issue at this time because Plaintiff's claim, as currently pled, falls outside of § 501(b) for other reasons discussed below.

C. THE UNION MUST FAIL TO ACT WITHIN A REASONABLE TIME AFTER A DEMAND.

Section 501(b) permits a union member to bring a lawsuit against a union official only when the union's governing board or officers refuse or fail to sue the official within a reasonable time after being requested to do so by any union member. Plaintiff's Application contains no allegations which satisfy this requirement. That is, Plaintiff does not allege that she demanded that Union officials take action against Mr.

Flournoy, and that these Union officials failed or refused to take appropriate action against Mr. Flournoy within a reasonable period of time. The Court could find § 501(b)'s demand requirement to be satisfied if requiring a demand on union officials would be futile. However, Plaintiff's Application pleads no facts which establish that a demand, as required by § 501(b), would be futile.

D. PLAINTIFF'S ACTION MUST BE FOR THE BENEFIT OF THE UNION.

A suit under § 501(b) must be brought for the benefit of the union. That is, § 501(b) does not authorize suits which would only benefit the individual union member bringing the lawsuit.[2/] The union member must be seeking redress on behalf of the entire union. See, e.g., Pignotti v. Sheet Metal Workers' Int'l Ass'n, 477 F.2d 825 (8th Cir. 1973); Phillips v. Osbourne, 403 F.2d 826 (9th Cir. 1968); Guzman v. Bevona, 791 F. Supp. 80 (S.D.N.Y. 1992); Fabian v. Freight Drivers & Helpers, 448 F. Supp. 835 (D. Md. 1978); and Slavich v. United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 551, No. 84-C-454, 1986 WL 6957 (N.D. Ill. Jun. 13, 1986).

Plaintiff's Application alleges that Mr. Flournoy "wilfully and maliciously failed to prosecute Plaintiff's grievance in a manner that had even a remote chance of success." Doc. No. 2, ¶ 6. The undersigned finds that Plaintiff's claim involves a purely personal dispute over the manner in which Mr. Flournoy pursued Plaintiff's grievance against Defendant. Plaintiff's claim is, therefore, not for the benefit of the

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[2/] Suits under § 501(b) may be analogized to shareholder derivative suits, where an individual shareholder sues on behalf of the corporation. See Fed. R. Civ. P. 23.1.

Union, but for her own personal benefit. The court in Slavich reached the same result on nearly identical facts

While employed by The Ford Motor Company ("Ford"), Mr. Slavich was a member of the United Auto Workers Union ("UAW"). Mr. Slavich alleged that Ford fired him after a work-related injury. After he was fired, Mr. Slavich filed a grievance with Byron Cooper, a UAW union representative. Mr. Slavich's grievance was ineptly handled by Mr. Cooper, and Mr. Slavich brought an action under § 501(b) against Mr. Cooper. The court dismissed the claim against Mr. Cooper, finding it to be a purely personal dispute, and not a dispute brought on behalf of the UAW. Slavich, 1986 WL 6957, at * 2-3.

In Salvich, the Court offered the following rationale for its decision, which the undersigned finds persuasive:

> Even if § 501 allows fiduciary claims beyond those involving money and property, it does not contemplate the federalization of every claim that a union member may have against an individual union officer. "Section 501 is not a catch-all provision under which union officials can be sued on any ground of misconduct with which a union member chooses to charge them." Richardson v. Tyler, 309 F. Supp. 1020, 1023 (N.D. Ill. 1970). Rather, § 501 authorizes claims involving fiduciary responsibilities to the labor organizations and its membership as a whole.
>
> . . .
>
> [The court has not been provided] with any authority wherein a court allowed a § 501 claim predicated on an individual member's dissatisfaction with a union officer's conduct during the processing of a grievance. The cases which have permitted other fiduciary claims involve instances of official misconduct which impacts either the

> entire union membership or a significant portion of it. See, e.g., Lodge 1380 v. Dennis, 625 F.2d 819 (9th Cir. 1980) (officer refused to conduct constitutionally required referendum vote); Stelling v. International Brotherhood of Electrical Workers, 587 F.2d 1379 (9th Cir.1978) (denial of right to vote); Pignotti v. Local # 3 Sheet Metal Workers Int. Ass'n, 477 F.2d 825 (8th Cir.) (plaintiffs sought "restoration of orderly democratic processes to the local union"); Sabolsky v. Budzanosky, 457 F.2d 1245 (3d Cir.) (officials using funds to maintain locals that should have been disbanded).

Slavich, 1986 WL 6957, at *3. Consistent with the court's holding in Slavich, the undersigned finds that Plaintiff has failed to allege facts which would fit her claim within any of the category of cases which have allowed fiduciary claims unrelated to improper management or use of union property.

RECOMMENDATION

The undersigned finds that Plaintiff has failed to allege facts sufficient to state a claim against Mr. Flournoy under 29 U.S.C. § 501(b). Plaintiff has not pled facts sufficient to satisfy § 501(b)'s demand requirement. Plaintiff has failed to plead a claim on behalf of the Union. Rather, she has pled a claim which involves a purely personal dispute over the manner in which Mr. Flournoy pursued Plaintiff's grievance against Defendant. Consequently, the undersigned recommends that Plaintiff's *ex parte* "Application to File Derivative Action" against J.W. Flournoy be **DENIED WITHOUT PREJUDICE.** [Doc. No. 2].

Plaintiff has also filed an Application for Instructions. Plaintiff is seeking instructions about how to handle her request for a derivative claim in connection with

her obligation to file a Case Management Plan. Should the Court adopt this Report and Recommendation, Plaintiff's Application for Instructions would be **MOOT**. [Doc. No. 19].

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 20 day of December 1999.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE
The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 2nd Day of December, 1999.
C. Laitella, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 16 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARK L. WATSON,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 98-CV-282-EA

ENTERED ON DOCKET
DEC 17 1999

ORDER

On September 10, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $3,225.00 for attorney fees and $8.54 in costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $3,225.00 and $8.54 in costs for a total award of $3,233.54 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller

award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 16th day of December, 1999.

Claire V. Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 16 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACOB B. JOHNSTON,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

Defendant.

Case No. 98-CV-411-EA

ENTERED ON DOCKET
DATE DEC 21 1999

ORDER

On September 10, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $3,890.00 for attorney fees and $158.54 in costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $3,890.00 and $158.54 in costs for a total award of $4,048.54 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller

award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 16th day of December, 1999.

Claire V Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

for PETER BERNHARDT, OBA #741
Assistant United States Attorney
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(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE GARRETT,

Plaintiff,

v.

STATE OF OKLAHOMA, JERRY MADDOX, PAUL SIEGLER, DIANN YOUNG, SHELLY CLEMMONS, CURTIS DeLAPP, MARGARET SNOW, TOM JANER, and CITY OF BARTLESVILLE,

Defendants.

ENTERED ON DOCKET
DEC 21 1999

No. 99-CV-742-K (E)

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendant Paul Sigler's (captioned as "Paul Siegler") motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) and 41(b) for failure to state a claim upon which relief can be granted and failure to comply with the Federal Rules of Civil Procedure.

Plaintiff has failed to respond to Defendant's motion to dismiss. Pursuant to N.D. LR 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed Defendant's motion to dismiss, and, through an independent inquiry, has determined that Plaintiff has failed to state a claim for which relief can be granted.

For the reasons stated herein, the Motion to Dismiss Defendant Paul Sigler (# 25) is GRANTED and all claims in the above-captioned action against Defendant Sigler are DISMISSED.

ORDERED this 17 day of December, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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FILED
DEC 16 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WALTER E. BURNS,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 98-CV-400-EA**
	)	
KENNETH S. APFEL, Commissioner of Social Security Administration,	)	
	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE DEC 17 1999

ORDER

On September 14, 1999, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for an award of benefits. **No appeal was taken from this Judgment and the same is now final.**

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around December 13, 1999, the parties have stipulated that an award in the amount of $3,494.50 for attorney fees, $150.00 for District Court filing fees, and $8.54 for service costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of $3,494.50 for attorney fees, $150.00 for District Court filing fees, and $8.54 for service costs, for a total award of $3,653.04 under the Equal Access To Justice Act.

Claire V Eagan

~~SAM A. JOYNER~~
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT
Assistant United States Attorney
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAY A. LARGE,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security
Administration,

Defendant.

Case No. 97-CV-325-J

ENTERED ON DOCKET
DEC 17 1999

ORDER

On October 28, 1999, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for an award of benefits. **No appeal was taken from this Judgment and the same is now final.**

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around November 29, 1999, the parties have stipulated that an award in the amount of $2,555.75 for District Court attorney fees, $3,384.25 for Tenth Circuit Court of Appeals attorney fees, and $149.11 for costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of $2,555.75 for total District Court attorney fees, $3,384.25 for total Tenth Circuit Court of Appeals attorney fees, and costs of $149.11, for a total award of $6,089.11 under the Equal Access To Justice Act.

SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT
Assistant United States Attorney
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Tulsa, Oklahoma 74103-3809
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 21 1999

WENDY LONG,

Plaintiff,

v.

AMERICAN GOLF CORPORATION; GOLF CLUB, L.L.C.; SBC ASSET MANAGEMENT, INC,

Defendants.

Case No. 99-CV-78-K (J)

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendant SBC Asset Management, Inc.'s ("SBC/AMI's") motion for summary judgment. SBC/AMI contends that the Court lacks subject-matter jurisdiction over Plaintiff's complaint, due to her failure to exhaust her administrative remedies. SBC/AMI also asserts that there is no genuine issue of fact and that it is entitled to judgment as a matter of law, because it is not Plaintiff's employer under Title VII.[1]

History of Case

This case stems from Plaintiff Wendy Long's allegations that she was discriminated against while she worked at The Golf Club of Oklahoma (the "Club") and that she was discharged because she is female. Plaintiff began working at the Club in February, 1996. At that time, the Club was owned by The Golf Club of Oklahoma, Inc. ("TGCO"), a wholly-

[1]Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e–e-17.

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owned subsidiary of SBC/AMI. Moreover, TGCO's management, officers, and directors included employees and officers of SBC/AMI. SBC/AMI set up TGCO's discrimination policy and trained employees at the Club on discrimination issues. On February 27, 1997, TGCO sold the Club to Golf Club, L.L.C. ("GCL"). GCL hired American Golf Corporation ("AGC") to manage the Club. On March 4, 1997, AGC terminated Long's employment. In April and May, 1997, Plaintiff's attorney wrote to SBC/AMI, informing them of Long's allegations, noting that they included conduct prior to the sale to GCL, and stating that SBC/AMI would be joined in any proceedings. On June 19, 1997, Plaintiff filed a "Complaint Intake Questionnaire" with the Oklahoma Human Rights Commission ("OHRC") and the Equal Employment Opportunity Commission ("EEOC"). That form listed her employer as "The Golf Club of Oklahoma (please see back of this page)." On the reverse side, Plaintiff listed SBC/AMI, Golf Club II, Inc., and AGC all as d/b/a The Golf Club of Oklahoma. Plaintiff also listed Scott Erwin, as "General Manager of The Golf Club of Oklahoma." However, the official "Charge of Discrimination" listed her employers as "Golf Club II, Inc." and "The Golf Club of Oklahoma." Plaintiff signed this Charge on July 24, 1997. On September 10, 1997, Plaintiff signed an amended Charge of Discrimination, naming only AGC as her employer. Although SBC/AMI received the letters from Long's attorneys in April and May 1997, its President states that SBC/AMI did not receive notice of any Charge by Long naming SBC/AMI.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Exhaustion of Administrative Remedies

Because Plaintiff did not exhaust her administrative remedies by filing a claim against SBC/AMI with the EEOC, the Court lacks jurisdiction to hear her Title VII claim. *See Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1311 (10th Cir. 1980). The purpose of this requirement is to give Defendant notice of the charge and the EEOC an opportunity to attempt conciliation.[2] *See Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1185 (10th Cir.

[2]The purpose of Oklahoma's anti-discrimination statute is "to provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964 . . . ." Okla. Stat. tit. 25, § 1101.

1999); *Romero*, 615 F.2d at 1311. However, the Court must liberally construe EEOC complaints in order to accomplish Title VII's purposes and because laymen usually write such complaints. *See, e.g., Romero*, 615 F.2d at 1311. Therefore, the Court will allow a suit to proceed against a party not named in the EEOC complaint, where the Charge informally refers to that party in the body of the charge or where that party has a sufficient identity of interest with the named party to satisfy Title VII's notice requirements. *See id.* The Court will allow a Title VII action to proceed against an unnamed party if there is a "clear identity of interest between the unnamed defendant and the party named in the administrative charge."[3] *Knowlton*, 189 F.3d at 1185.

Although the EEOC had an opportunity to pursue Plaintiff's claims against SBC/AMI, Plaintiff has failed to establish that SBC/AMI had adequate notice of her EEOC complaint. Plaintiff clearly listed SBC/AMI in her Intake Questionnaire but not on the subsequent Charges of Discrimination signed by Plaintiff. The Court primarily and usually looks only to this formal Charge in order to determine whether Plaintiff properly exhausted her claims before the EEOC. *See Welsh v. City of Shawnee*, No. 98-6243, 1999 WL 3455997 *5 (10th Cir. June 1, 1999) (unpublished). This is because the formal Charge is the key document that

[3]The Court considers at least the four following factors in determining this identity of interest: (1) whether Plaintiff, through reasonable effort, could have ascertained the role of SBC/AMI; (2) whether the interests of the parties named are so similar to SBC/AMI's that, for the purpose of obtaining voluntary conciliation and compliance, it would be unnecessary to include SBC/AMI in the EEOC proceedings; (3) whether SBC/AMI's absence from the EEOC proceedings resulted in actual prejudice to its interests; and (4) whether SBC/AMI in some way represented to Plaintiff that its relationship with her was through the named parties. *See Romero*, 615 at 1311-12.

instigates the Title VII process, is signed under oath or affirmation, and must describe the complained of practices. *See id.* In an analogous situation, the Tenth Circuit has found that *charges* contained in an information sheet very similar to the Intake Questionnaire were not exhausted when not included in a subsequent formal Charge. *See id.* *5 n.6, 6. As the Tenth Circuit noted,

> [Plaintiff's] submission of the information sheet to the EEOC may be some indication that at some point she intended it to investigate her harassment allegations. However, her subsequent filing, under oath, of the charge clearly containing allegations against only McCalip regarding gender discrimination effectively negated the information sheet. Although she was without counsel at the time, anyone reading the charge would realize that it did not include allegations regarding Land's inappropriate actions.

Id. at *5. In this case, Plaintiff may have misunderstood the implication of the initial Charge, which listed GCL and "The Golf Club of Oklahoma" in Broken Arrow, Oklahoma, as her employers. Even though the Club's address was not SBC/AMI's Houston address and Plaintiff knew that the Club had changed hands, she may have thought that the denotation "The Golf Club of Oklahoma" included all three parties she listed as d/b/a the Club. However, when she signed the amended Charge, listing only AGC as her employer, Plaintiff should have noticed that it no longer included SBC/AMI or anyone related to SBC/AMI.

Furthermore, the situation in this case is more troubling than that in *Welsh*. *Welsh* involves a Plaintiff's failure to list all of her claims against a *single* employer, but one which had notice of the EEOC proceedings. In this case, the Charge's failure to list SBC/AMI or anyone in a close relationship with it, negated any chance of SBC/AMI receiving official

notice of the Charge. Plaintiff has demonstrated that SBC/AMI at least had notice that Plaintiff claimed she was discriminated against prior to the sale of the Club and that she intended to include SBC/AMI "in any proceeding." However, this evidence does not controvert Defendant's sworn statement that it received no notice of any charge filed by Long with the EEOC, and Plaintiff has failed to put forth specific facts contradicting this evidence.[4]

IT IS THEREFORE ORDERED that Defendant, SBC Asset Management, Inc.'s Motion for Summary Judgment (# 26) is GRANTED.

ORDERED THIS 16 DAY OF DECEMBER, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

[4]As Plaintiff has failed to exhaust her administrative remedies, the Court lacks subject-matter jurisdiction to hear Defendant's remaining arguments for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 21 1999

DWAYNE M. GARRETT,	)	
	)	
Plaintiff,	)	
	)	**No. 99-CV-716-K (E)**
v.	)	
	)	
STATE OF OKLAHOMA and JOE L. WHITE, an individual,	)	
	)	
	)	
Defendants.	)	

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Lisa Breshears and Jim Hallett's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The Court has been unable to find mention of either Breshears or Hallett in Plaintiff's complaint. However, assuming they are parties to this case, the claims against them must be dismissed.

Plaintiff has failed to respond to Breshears and Hallett's motion to dismiss. Pursuant to N.D. LR 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed the motion to dismiss and, through an independent inquiry, has determined that Plaintiff has failed to state a claim for which relief can be granted against Breshears and Hallett, if he makes any claims against them at all.

IT IS THEREFORE ORDERED that Lisa Breshears and Jim Hallett's Motion to Dismiss Complaint (# 3) is GRANTED and all claims in the above-captioned action against Lisa Breshears and Jim Hallett are DISMISSED.

ORDERED this 16 day of December, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSEPH E. ALVES and KRISTI ALVES,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 99-CV-48-K (J)**
	)	
SILVERADO FOODS, INC. and SILVERADO FOODS WELFARE BENEFIT PLAN,	)	
	)	ENTERED ON DOCKET
Defendants.	)	DATE DEC 21 1999

JUDGMENT

This matter came before the Court for consideration of Plaintiffs' Motion for Summary Judgment (# 12) and Defendants' Motion for Summary Judgment (# 14). The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the parties as outlined in the Order.

ORDERED THIS 17th DAY OF DECEMBER, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

23

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSEPH E. ALVES and KRISTI ALVES,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 99-CV-48-K (J)**
	)	
SILVERADO FOODS, INC. and SILVERADO FOODS WELFARE BENEFIT PLAN,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE DEC 21 1999

ORDER

Before the Court are Plaintiffs' and Defendants' motions for summary judgment. Plaintiffs ask the Court to determine that Defendants have no right of subrogation and refund, because Plaintiffs cannot be made whole and Defendants have not paid any benefits. Plaintiffs also request the Court find that Defendants have breached their fiduciary duties to Plaintiffs by refusing to process and pay claims, requiring Plaintiffs to give up their legal rights in order to receive claim payments, and attempting to hire Plaintiffs' tort attorney despite a known conflict between Plaintiffs and Defendants.

Defendants ask the Court to determine that the subrogation clause does not violate public policy and the supplemental reimbursement agreement does not impermissibly broaden Defendants' rights under the plan.

Brief History of Case

This case arises from a March 1997 automobile accident in which Plaintiff Kristi

Alves and her minor son, Braden, were injured. As a result of that accident, Ms. Alves incurred medical bills exceeding $ 100,000.00. Ms. Alves is the spouse and dependent of Joseph E. Alves, who worked for Defendant Silverado Foods, Inc. ("Silverado") and participated in the Silverado Foods Welfare Benefit Plan (the "Plan"), which is sometimes referred to as the Silverado Foods Employee Benefit Plan. Because there was the possibility that a third party might be liable for the accident, the Plan required Plaintiffs to sign its standard subrogation agreement before it would pay any claims. Plaintiffs refused to sign this agreement, because they felt that it would waive their legal rights. Defendants proposed a second agreement, which Plaintiffs also refused to sign. Plaintiffs proposed their own agreement, but it failed to meet Defendants' approval. The Plan has refused to make any payments until Plaintiffs sign the agreement and submit additional detailed information regarding the circumstances surrounding their claim.

Plaintiffs are pursuing a claim against the third party responsible for the automobile accident. This third party has tendered the limits of their liability policy, or $ 100,000.00. Because this would be less than Plaintiffs' total damages, they would not be fully compensated if they assigned this money to the Plan in exchange for its payment of benefits.

The Plan is a self-funded welfare plan. The Plan Administrator and Named Fiduciary is Silverado. As Plan Administrator, Silverado may appoint an individual to be a plan administrator and serve at Silverado's convenience. The document setting out the terms of the Plan is entitled, "Plan Document and Summary Description for Silverado Foods

Employee Benefit Plan." (Defs.' Mot. Summ. J., Ex. A (hereinafter "Plan Document").) The Plan has hired Johnson Brokers & Administrators, Inc. ("JB&A") to administer claims submitted to the Plan.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *see also Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Mach.*, 48 F.3d 478, 485 (10th Cir. 1995).

Standard of Review

Before analyzing the issues raised in the summary judgment motions, the Court must decide the proper standard of review of Silverado's interpretation of the plan. Because this

is a denial-of-benefits case, Silverado's conditional denial of ERISA[1] benefits is subject to *de novo* review, unless the Plan gives the administrator discretionary authority to determine eligibility for benefits or construe the plan. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

Because the Plan gives Silverado, as Plan Administrator, this discretion, an arbitrary and capricious standard applies absent a limiting circumstance. *See id.* The Plan provides that it is its express intent "that the Plan Administrator shall have maximum legal discretionary authority to construe and interpret the terms and provisions of the Plan, to make determinations regarding issues which relate to eligibility for benefits, to decide disputes which may arise relative to a Plan Participant's rights, and to decide questions of Plan interpretation and those of fact relating to the Plan." (Plan Document at 37.)

Under a pure arbitrary and capricious standard, the administrator's decision will be upheld if it was reasonable, given the terms of the plan, and made in good faith. *See Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1292 (10th Cir. 1999). Moreover, the administrator's decision need not be the only logical one or best one. Rather, it only need be sufficiently supported by the facts within his knowledge to counter a claim that it was arbitrary and capricious. *See Kimber v. Thiokol Corp.*, — F.3d —, —, 1999 WL 1020834 *5 (10th Cir. 1999). In other words, the Court will uphold the administrator's decision if it falls "somewhere on the continuum of reasonableness – even if on the low end." *Id.* (quoting

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[1]Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461.

Vega v. National Life Ins. Servs., Inc., 188 F.3d 287, 297 (5th Cir. 1999) (internal quotation marks omitted)).

A pure arbitrary and capricious standard is not appropriate, however, when there is a conflict of interest. *See Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 1996). In such instances, the Court, while applying the arbitrary and capricious standard, will decrease the level of deference in proportion to the seriousness of the conflict. *See id.* at 825, 826-27 (finding the administrator's decision not arbitrary and capricious where the evidence strongly supported its decision).

The Court will not assume a per se conflict of interest exists when the fiduciary works for or is the company funding the plan. *See Jones*, 169 F.3d at 1291; *Kimber*, 1999 WL 1020834 *4. The Court will consider several factors in determining the existence of a conflict of interest. These factors could include the following: whether (1) the plan is self-funded; (2) the company funding the plan appoints and compensates the plan administrator; (3) the plan administrator's performance review or level of compensation are linked to the denial of benefits; and (4) the provision of benefits has a significant economic impact on the company administering the plan. *See Jones*, 169 F.3d at 1291. Once the Court concludes that the administrator's dual role, as corporate employee and plan administrator, has jeopardized his impartiality, his discretionary decisions will be viewed with less deference. *See id.*

The Plan in this case is self-funded and Silverado, the company funding the Plan, appoints its administrator. Plaintiffs have provided no evidence that the plan administrator's pay or performance review are linked to the denial of benefits, nor have they demonstrated that the benefits have a significant economic impact on Silverado. In similar circumstances, the Tenth Circuit has found insufficient evidence to support a claim of conflict of interest. *See Kimber*, 1999 WL 1020834 at *4 (finding (1) plan was self-funded; (2) company funding plan paid and appointed the administrator; (3) administrator was a salaried employee, owned no company stock, and was not a corporate officer; and (4) long term disability costs totaled 0.3% of the company's operating expenses).

The Court, therefore, finds that a pure arbitrary and capricious standard is appropriate in this case. The Court will uphold Silverado's decision if it is reasonable, in view of the Plan provisions, and in good faith.

Plan's Right to Subrogation-Refund

As a preliminary matter, a subrogation clause is not per se void or unenforceable. *See Member Servs. Life Ins. Co. v. American Nat'l Bank & Trust Co.*, 130 F.3d 950, 958 (10th Cir. 1997) (noting that there is no ERISA policy requiring or barring a subrogation clause and refusing to override an express contractual provision by reading one into the plan). The applicability of the make whole doctrine to the clause at issue in this case will be discussed below.

Plaintiffs argue that, under the express terms of the Plan, there is no right to subrogation or refund until the Plan has paid benefits. The Plan states that,

> Accepting benefits under this Plan for those incurred medical or dental expenses [cause by a third party] automatically assigns to the Plan any rights the Covered Person may have to recover payments from any third party or insurer. This subrogation right allows the Plan to pursue any claim which the Covered Person has against any third party, or insurer, whether or not the Covered Person chooses to pursue that claim. The Plan may make a claim directly against the third party or insurer, but in any event, the Plan has a lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This lien shall remain in effect until the Plan is repaid in full.

(Plan Document at 34.) This language indicates that the "subrogation right" does not arise until after the Plan pays benefits and is intended to compensate the plan for those benefits paid. *Cf. Barnes v. Independent Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1393-94 (9th Cir. 1995) (under *de novo* review, interpreting language "if this plan makes payment . . . this Plan is subrogated to all rights of recovery to the extent of its payment" as allowing subrogation only if the plan pays benefits). Similarly, the "refund" right involves the "repayment to the Plan for . . . benefits that it has paid . . . ." (Plan Document at 34.)

Under the clear language of the Plan, both the subrogation and refund rights arise only after the payment of benefits by the Plan. To interpret the Plan otherwise, in the face of this unambiguous language, would be unreasonable. As the Plan has yet to pay any benefits to Plaintiffs, the Plan currently has no subrogation or refund rights.

Supplemental Reimbursement Agreement

The Plan's ability to require Plaintiffs to execute additional instruments securing its right to subrogation is not dependent on its payment of benefits. That the Plan's subrogation-refund rights are not perfected prior to the payment of benefits does not necessarily mean that the Plan's ability to secure these rights are also so limited. Rather, the question turns on whether the administrator's decision to require a signed subrogation form is in good faith and reasonable in light of the Plan's language.

The Plan is clear in conditioning payments on the execution of required instruments and the assignment of the insured's rights to third-party recoveries. The Plan states,

> When a right of recovery [from third parties] exists, the Covered Person will execute and deliver all required instruments and papers as well as doing whatever else is needed to secure the Plan's right of subrogation as a condition to having the Plan make payments. In addition, the Covered Person will do nothing to prejudice the right of the Plan to subrogate.

(Plan Document at 34.)

Moreover,

> As a condition to the Plan making payments for any medical or dental charges, the Covered Person must assign to the Plan his or her rights to any recovery arising out of or related to any act or omission that caused or contributed to the Injury or Sickness for which such benefits are to be paid. The scope of this assignment is consistent with the amount subject to subrogation or refund set forth above.

(Plan Document at 34.) Under these provisions, it is reasonable for Silverado to require some sort of signed document securing the Plan's right of subrogation, even before that right to subrogation arises. *Cf. Cagle v. Bruner*, 112 F.3d 1510, 1520 (11th Cir. 1997) (per curiam)

(finding that administrator did not act arbitrarily and capriciously in requiring signed subrogation agreement before making payments, even though not enforceable until plan paid benefits). The question then becomes whether it was reasonable for Silverado to require the signing of the two documents it submitted to Plaintiffs for signature.

The first proposed subrogation agreement is a standard form used by the Plan's claims administrator, JB&A. It reads as follows:

> In accordance with the Subrogation provision of the SILVERADO FOODS Employee Health Benefit Plan, the undersigned hereby agrees to reimburse and pay promptly to the SILVERADO FOODS Employee Health Benefit Plan an amount not exceeding the aggregate amount of benefits paid or to be paid to me or on my behalf under said Plan for charges incurred as a result of injury sustained or disease contracted on or about _____ in _____ County, State of _____ out of recovery by settlement or judgment or otherwise, from any person's or organization's insurance.
>
> The undersigned agrees to execute instruments and papers, furnish information and assistance, and to take other necessary and related actions that SILVERADO FOODS may require to facilitate its right of reimbursement under the Employee Health Benefit Plan.
>
> The undersigned represents and warrants that no release or discharge has been given with respect to his (their) rights of recovery described herein and that the undersigned has done nothing to prejudice said rights.

(Pls.' Opening Br. Supp. Mot. Summ. J., Ex. C.)

Plaintiffs have not pointed to any specific portion of this agreement that they feel compromises their legal rights. The Court finds that this agreement is a reasonable restatement of the Plan. The first paragraph merely states that the signor intends to comply with the subrogation agreement as outlined in the Plan as it relates to a specific injury. The

second and third paragraphs are a reasonable restatement of the Plan provision outlined above, beginning with "When a right of recovery . . . ."

Defendants later proposed a second agreement, entitled "Participant's Acknowledgment of Right of Subrogation and Reimbursement." That agreement reads,

> The undersigned hereby acknowledges that:
> 1. She is a participant in an ERISA-governed employee welfare benefit plan established by her employer, Silverado Foods. The terms of the Plan govern the rights and obligations of the participant, the employer and the Plan with regard to health benefits.
> 2. The Plan contains a subrogation provision with a right of reimbursement for the benefit of the Plan. Participant acknowledges the existence and enforceability of the right of subrogation and agrees to abide by all of its terms.
> 3. Participant understands that failure to acknowledge this right of subrogation and failure to abide by the subrogation provisions' requirements can result in denial of claims and/or cancellation of coverage under the ERISA-governed employee welfare benefits plan established by Silverado Foods.
> 4. Participant warrants that he [sic] has done nothing and will do nothing to prejudice the right of subrogation contained in the Plan.

(Pls.' Opening Br. Supp. Mot. Summ. J., Ex. D.)

Unlike the earlier agreement, this document contains several misrepresentations and unreasonable interpretations of the Plan. As a preliminary point, Plaintiffs object to the agreement's reference to Ms. Alves as a "participant," when she is a "beneficiary" under ERISA. The Court notes that it also refers to "her employer, Silverado Foods." Ms. Alves is not an employee of Silverado, rather her husband is employed there. The Court does note,

however, that the Plan defines a "Plan Participant" as "any Employee or Dependent who is covered under this Plan." (Plan Document at 22.)

Paragraph 1 continues, "The terms of the Plan govern the rights and obligations of the participant . . . ." This could be construed as a waiver of certain rights, such as the federal common law make whole rule, that may exist in the absence of express contrary language.

Paragraph 2 provides that the "Participant acknowledges the existence and enforceability of the right of subrogation and agrees to abide by all of its terms." This is a reasonable interpretation of the Plan. The Plan requires the Covered Person to do "whatever else is needed to secure the Plan's right of subrogation . . . ." (Plan Document at 34.) Acknowledging the existence and enforceability of the Plan's subrogation right easily can be viewed as necessary to secure that right.

The agreement continues in paragraph 3, that Ms. Alves understands that failure to acknowledge the subrogation right or follow its requirements "can result in denial of claims and/or cancellation of coverage . . . ." While the Plan states that the execution of required instruments is a condition to the Plan making payments, to state that such failure can justify a cancellation of coverage is an unreasonable interpretation of the Plan. The Plan sets forth three dates when coverage terminates. They are as follows: (1) when the Plan is terminated; (2) when the covered employee ceases to be in one of the eligible classes; and (3) when the required contribution has not been paid. (Plan Document at 5.)

While the parties have not been completely clear on this issue, it appears from the uncontroverted facts that Defendants required Plaintiffs to sign *one* of the above agreements, before the Plan would pay any benefits. While Plaintiffs could not be required to sign the second agreement, they could be required to sign the first. To the extent that the Defendants' refusal to pay benefits depended on the Plaintiffs' refusal to sign the first agreement, this refusal was not arbitrary and capricious. To the extent it turned on the refusal to sign the second agreement only, the refusal was arbitrary and capricious.

Make Whole Doctrine

Plaintiffs argue that the Plan is not entitled to any reimbursement until Ms. Alves is "made whole." That is, Ms. Alves must be compensated entirely for all expenses arising from the accident before she owes the Plan anything.

Four circuits have adopted the make whole rule as the default rule in interpreting an ERISA plan. *See Cagle v. Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997) (per curiam); *Barnes v. Independent Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1395 (9th Cir. 1995); *Marshall v. Employers Health Ins. Co.*, Nos. 96-6063, 96-6112, 1997 WL 809997 *4 (6th Cir. Dec. 30, 1997) (per curiam) (unpublished); *Sanders v. Scheideler*, 816 F. Supp. 1338, 1347 (W.D. Wis. 1993) (adopting the make whole rule as default rule in ERISA federal common law), *aff'd,* 25 F.3d 1053, No. 93-3044, 1994 WL 234497 *1 (7th Cir. June 1, 1994) (unpublished) (finding district court ruling appropriate at least where state in which plan was drafted adopts the make whole rule). Another circuit has

yet to decide the issue, finding that the plan before the court unambiguously rejected the make whole rule. *See Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Bargaining Hourly Employees v. Whitehurst*, 102 F.3d 1368, 1377 (5th Cir. 1996) (noting in dicta its reservations about the make whole rule). Finally, one circuit has found the state-law make whole rule preempted and has not discussed the possibility of a federal common law rule. *See Waller v. Hormel Foods Corp.*, 120 F.3d 138, 140 (8th Cir. 1997) (noting that the issue turns solely on the proper interpretation of the plan's subrogation provision).

This Court need not decide the applicability of the make whole doctrine in this case, because the Plan explicitly rejects it. When applicable, the make whole doctrine is a default rule that can be overridden by the express language of the Plan. *See Cagle*, 112 F.3d at 1522; *Barnes*, 64 F.3d at 1395. The Plan states that it shall have a lien over any amount recovered by the Covered Person "until the Plan is repaid in full." It also states that the Plan's subrogation and reimbursement rights

> provide the Plan with a priority over <u>any</u> funds paid by a third party to a Covered Person relative to the Injury or Sickness, including a priority over any claim for non-medical or dental charges, attorney fees, or other costs and expenses. Notwithstanding its priority to funds, the Plan's subrogation and refund rights . . . are limited to the extent to which the Plan has made, or will make, payments for medical or dental charges as well as any costs and fees associated with the enforcement of its rights under the Plan.

(Plan Document at 34 (emphasis in original).) These provisions explicitly adopt the Plan Priority rule, the opposite of make whole, whereby the Plan must be completely reimbursed before Plaintiffs can keep any of the money recovered from the third-party tortfeasor.

Common Fund Doctrine

Plaintiffs ask the Court to recognize the federal common law "common fund" doctrine as requiring the Plan to share in the cost of suing the third party and thus creating a fund from which the Plan will benefit. The common fund doctrine applies when the plan's language is ambiguous or silent. *See Waller v. Hormel Foods Corp.*, 120 F.3d 138, 141-42 (8th Cir. 1997); *see also Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495-96 (7th Cir. 1997) (finding that ERISA did not preempt Illinois' common fund doctrine); *cf. United McGill Corp. v. Stinnett*, 154 F.3d 168, 173 (4th Cir. 1998) (not deciding if common fun doctrine is part of federal common law, because plan language unambiguously required participant to bear own attorney fees); *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997) (same, because plan's express language required full reimbursement of plan to extent recovery exceeded attorney fees); *Ryan v. Federal Express Corp.*, 78 F.3d 123, 125, 127-28 (3d Cir. 1996) (refusing to override plan provision requiring 100% repayment if recovery exceeds the amount of benefits and attorney fees). While several courts have found the plain language of an ERISA plan to override the common fund doctrine, Defendants failed to disclose nor can the Court find any case in which participants were required to turn over the entire third-party suit proceeds *and* solely bear the cost of the suit. *See United McGill Corp.*, 154 F.3d at 173 n.* (noting that it was not deciding a case where the third-party recovery after deducting attorney fees is less than the plan's reimbursement claim); *Bollman Hat Co.*

v. Root, 112 F.3d 113, 117 (same); *cf. Health Cost Controls*, 139 F.3d at 1071 (involving plan that only recovered proceeds in excess of attorney fees); *Ryan*, 78 F.3d 123, 125 (same).

In this case, Plaintiffs are facing the prospect of turning over their entire third-party suit recovery to the Plan. It would inequitable and contrary to the language of the Plan to require the Plaintiffs to sue in order to obtain a recovery that would only benefit the Plan and then pay the attorney fees for this action from their own pocket. The purpose of a subrogation clause, like that of equitable subrogation, is to prevent double recovery by an insured and require the wrongdoer to bear the ultimate costs. *See Allstate Ins. Co. v. Mazzola*, 175 F.3d 255, 258 (2d Cir. 1999). As Judge Posner has noted,

> A legal right, for example a tort victim's right to sue his tortfeasor for damages, is like a lottery ticket. Its payoff is highly uncertain. Subrogation, consistent with the objective of insurance, transfers the lottery ticket from the individual policyholder to the collectivity of policyholders. The risk is spread, and by being spread eliminated or at least greatly reduced. Subrogation also eliminates the incentive to careless behavior created by the collateral benefits rule, which by enabling the insured victim of a tort to recover for the same loss from both the insurance company and the tortfeasor may (depending on the adequacy of tort damages) make the tort victim better off than he would have been had there been no accident.

Cutting v. Jerome Foods, Inc., 993 F.2d 1293, 1298 (7th Cir. 1993).

Like the Eight Circuit, this Court adopts the federal common law rule that, where an ERISA plan is silent as to the recovery of attorney fees, the common fund doctrine will apply. *See Waller*, 120 F.3d at 141-42; *Great-West Life & Annuity Ins. Co. v. Clingenpeel*, 996 F. Supp. 1353, 1357-58 (W.D. Okla. 1997); *cf. Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978) (recognizing the applicability of the common fund doctrine in certain

circumstances where a plan participant prevails in a suit against the plan trustee for failure to discharge fiduciary duties in a proper manner). Here, the Plan mentions that its subrogation and refund rights have priority over "any claim for . . . attorney fees" from "funds paid by a third party to a Covered Person." (Plan Document at 34.) It does not, however, explicitly provide for the much more extreme notion that the Covered Person must pay all the attorney fees *and* turn over their entire recovery to the Plan. It would be patently unreasonable to read in such a provision where the Plan is silent. The Plan, therefore, is responsible for its *pro rata* share of the reasonable attorney fees and costs incurred in recovering from the third-party tortfeasor. As the Plan is likely to recover 100% of the settlement or judgment, this *pro rata* share may well be the entire amount.

Breach of Fiduciary Duty

Plaintiffs argue that Silverado breached its fiduciary duty to them, as Plan participants, in the following three ways: (1) by refusing to process and pay Plaintiffs' claims following the accident; (2) by proposing a supplemental reimbursement agreement; and (3) by attempting to hire Plaintiffs' tort attorney to represent the Plan's interest in the third-party tort suit.

Neither Silverado's conditional refusal to pay Plaintiffs' claims nor its proposal of the standard subrogation agreement constituted a breach of its fiduciary duties under the Plan. As noted above, Silverado's refusal to pay any benefits until Plaintiffs signed the standard

subrogation form was not an arbitrary and capricious interpretation of the Plan. Section 404 of ERISA provides that,

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan . . . .

29 U.S.C. § 1104(a)(1)(D). *See also Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1121 (10th Cir. 1991) (interpreting a life insurance company's fiduciary duties under a group policy). As Silverado properly interpreted and executed its duties under the Plan, it did not breach its ERISA-imposed fiduciary duty.

The second proposed "acknowledgment," however, was contrary to the plain language of the Plan. This error was harmless, because Plaintiffs could have signed the properly-drafted subrogation form first submitted to them. Plaintiffs have presented no evidence that the acknowledgment was an attempt to benefit anyone other than the Plan's participants and beneficiaries, as required by ERISA.

Finally, Plaintiffs have pointed to no action on the part of Silverado which would constitute an attempt to undermine their counsel's loyalty in this matter. Plaintiffs have put forth a letter from JB&A to Plaintiffs' attorney Marty Matthews, in which JB&A asserts the Plan's subrogation interest and its own interests as claims administrator. The letter continues,

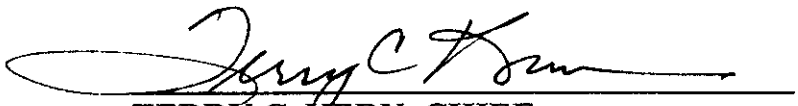
> Johnson Brokers and Administrators is recommending to Silverado Foods that the Plan engage an attorney to represent its subrogation interests in this matter on a contingency fee basis. If approved by Silverado, would you be interested

> in becoming that attorney for this case? In most instances, the same attorney represents the participant as well as the Plan.

(Pls.' Opening Br. Supp. Mot. Summ. J., Ex. M.) This letter merely indicates an intention by a non-party to the case, JB&A, to follow its usual practice. To the extent that the request is inappropriate, it cannot be attributed to Silverado. Plaintiffs present no evidence that Silverado in any way participated in this request. If anything, the opposite is indicated by the language predicating any hiring on Silverado's approval.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment (# 12) is GRANTED IN PART and DENIED IN PART and Defendants' Motion for Summary Judgment (# 14) is GRANTED IN PART and DENIED IN PART, as follows: (1) the Plan's subrogation clause is not void and unenforceable; (2) Defendants have no subrogation or refund rights until they have paid benefits under the Plan; (3) Defendants can require Plaintiffs to sign the standard subrogation form and provide accident-related information before paying benefits; (4) Defendants cannot require Plaintiffs to sign the second proposed "acknowledgment"; (5) the Plan's subrogation and refund rights are not subject to the make whole rule, that is Silverado can require full reimbursement even if Plaintiffs will not be fully compensated; (6) Defendants must pay a *pro rata* share of the reasonable attorney fees incurred in recovering from the third-party tortfeasor; and (7) Silverado has not breached its fiduciary duties to Plaintiffs.

ORDERED THIS 17th DAY OF DECEMBER, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 21 1999

RANDY BORUM,)
)
Plaintiff,)
)
v.) Case No. 98-CV-431-K (M)
)
COFFEYVILLE STATE BANK and)
CBS BANCORP, INC.,)
)
Defendants.)

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendants' motion for summary judgment, asking the Court to find Plaintiffs' claims barred by the statute of limitations or Kansas' statute of repose and that there is no dispute as to the material facts and Defendants are entitled to judgment as a matter of law on all those claims.[1]

I. Brief History of Case

This case arises from a loan agreement between Borum and Coffeyville State Bank, now named Community State Bank, (the "Bank"). Borum argues that the Bank and CBS Bancorp, Inc., injured him by failing properly to collect on the loan's collateral and by disguising their actual goal of undermining his father's position on the Bank's board of directors.

[1] In the interest of brevity, citations to the parties briefs and exhibits will be referenced as follows: Defendants' Motion for Summary Judgment ("Defs.' Mot."); Plaintiff's Combined Responses to Defendants' Motion for Summary Judgment, Motion in Limine, and Motion to Strike ("Pl.'s Resp."); and Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment ("Defs.' Reply").

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On May 17, 1984, Plaintiff executed Note # 10315-76, with a principal sum of $190,482.13 ("Note 76").[2] As collateral for this loan, Plaintiff assigned his right in a promissory note from the United Western Energy Corporation for $234,133.00 (the "UWECO Note"). (Defs.' Mot. Ex. H.) The Bank renewed Note 76 and others on April 11, 1985, with Note # 10315-79 ("Note 76/79"). (Pl.'s Resp. Ex. D.) This note extended payment until March 25, 1986. On July 16, 1986, Borum signed an agreement with the Bank, acknowledging his default on Note 76/79, the assignment of the UWECO Note as collateral, UWECO's default on the UWECO Note, and the reaching of an agreement between Borum and the Bank regarding the collection of the UWECO Note in order to pay on Note 76/79 (the "Settlement Agreement").[3] (Defs.' Mot. Ex. K.) This Agreement provided that the Bank would sue for the collection of the UWECO Note in Oklahoma state court, that the Bank would have sole discretion to pursue the litigation and apply the net proceeds to the balance on Note 76/79, and that Borum would remain liable for any remainder. Although he admits signing the Settlement Agreement, Borum contends that he

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[2]Defendants' Motion contains a misstatement, stating that "On *March* 17, 1984, Borum executed a promissory note with the Bank in the original principal sum of $190,482.13 ("Borum Note"). The Borum Note was extended by the Bank on April 11, 1985 and the payment of the remaining principal balance, plus accrued interest, was extended to March 25, 1986." (Defs.' Mot. ¶ 10 (emphasis added).) Plaintiffs disingenuously respond that, "The Plaintiff Randy Borum never executed a promissory note to the Bank dated March 17, 1984, for the principal sum of $190,482.13 or for any amount." (Pl.'s Resp. ¶ 1.) Plaintiff makes no attempt to assert that the May 17, 1984, Note did not exist, and its existence is amply supported by the exhibits submitted by both Defendants *and* Plaintiff. *See* Pl.'s Resp. Exs. D, F; Defs.' Mot. Exs. H, O, P, Q, R; Defs.' Reply Exs. Z, AA, BB, CC, DD, EE, FF.

[3]Plaintiff's "Controverted Facts" state that the Settlement Agreement did not regard a *March* 17, 1984, note for $190,482.13 but rather was based on an entirely different note for $110,825.63, which was not in default. (Pl.'s Resp. ¶ 2.) Plaintiff again fails to disclose that his own exhibit D shows that the note for $110,825.63, Note 79, was a renewal of Note 76 and two other notes and was due over three months prior to the Settlement Agreement.

did not read it. The Bank sued UWECO, along with Sherry M. Earles, Harvey L. Earles, Jean Earles, and Harold H. Earles' Estate (the "Earles"), the personal guarantors of the UWECO Note. In November 1986, this suit resulted in a judgment of $144,933.56 against these parties. Unfortunately, the UWECO parties claimed to be unable to meet the judgment, with some even threatening immediate bankruptcy. On February 26, 1987, UWECO, the Earles, and the Bank entered a settlement agreement in which the parties agreed to pay the Bank $10,500.00, turn over certain oil and gas leasehold, royalty interests, and mining interests, and execute two promissory notes to the bank ("UWECO Settlement Agreement"). (Defs.' Mot. Ex. M.) The two promissory notes were executed by UWECO, Handel's Capital, Inc. ("HCI"), and Kanwal Dhiman. The first promissory note was for $126,000.00 ("Note I") and the second was for $18,000.00 ("Note II"). Both would mature on February 26, 1990. In exchange for these items, the Bank released both UWECO and the Earles from the Judgment. On March 6, 1987, Borum signed an agreement with the Bank, effective February 26, 1987, in which he ratified and approved the UWECO Settlement Agreement; agreed that all proceeds from that agreement would be applied to Note 76/79; renewed Note 76/79 by Notes # 10315-82, -83, -84, and -85; and agreed that the Bank could sue Borum in the event that he defaulted under the renewed notes ("Ratification Agreement"). (Defs.' Mot. Ex. O.) Borum never made payment on Notes 82-85. On July 1, 1988, Borum's father and Bank board member, Troy Borum, executed a guarantee agreement, in which he agreed to guarantee Notes 82, 83, 84, and 85. (Defs.' Mot. Ex. R.) Borum acknowledges signing the

Ratification Agreement but says he did not read it, did not know about the UWECO Settlement Agreement, and did not know that it was to ratify a settlement agreement releasing the Earles. Neither UWECO, HCI, nor Dhiman ever made any payments on Notes I or II. These three entities also owed Troy Borum money related to a settlement agreement similar to the UWECO Settlement Agreement. On February 25, 1992, the Bank and Troy Borum sued UWECO, HCI, and Dhiman over these obligations and obtained a judgment in the amount of the principal owed plus interest.

Plaintiff now sues the Bank and CBS Bancorp, Inc., for fraud, breach of good faith and fair dealing, breach of contract, and intentional infliction of emotional distress.[4]

II. Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be

[4]Plaintiff's response to Defendants' motion for summary judgment mentions several times that Defendants breached their fiduciary duty to Plaintiff. Plaintiff's complaint makes no mention of any such claim nor has he amended his complaint to add this claim. The Court will not address any alleged breach of fiduciary duty.

tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Mach.*, 48 F.3d 478, 485 (10th Cir. 1995).

III. Statute of Limitations

A. Applicable Law

The Court will apply the statute of limitations of Oklahoma or Kansas that last bars Plaintiff's claims. In a diversity case, the Court applies the statute of limitations that the forum state's courts would apply, even if the action is brought under the law of a different state. *See Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 483-84 (10th Cir. 1990). Oklahoma law provides that,

> The period of limitation applicable to a claim accruing outside of this state shall be that prescribed either by the law of the place where the claim accrued or by the law of this state, whichever last bars the claim.

Okla. Stat. tit. 12, § 105. The Court examines each claim, in turn, to determine the applicable statute of limitations.

B. Fraud

A two-year statute of limitations, calculated from the date on which Plaintiff, with reasonable diligence, could have discovered the fraud, applies to this claim. Oklahoma and Kansas' limitations law are strikingly similar with regards to fraud. Kansas' limitations statute places a two-year limit on fraud claims but runs this limit from the date the fraud is

discovered or could have been discovered through the exercise of reasonable diligence. *See* Kan. Stat. Ann. tit. 60-513(a)(3); *Wolf v. Brungardt*, 524 P.2d 726, 734 (Kan. 1974). Similarly, in Oklahoma, a two-year statute of limitations applies, also subject to the discovery rule.[5] *See* Okla. Stat. tit. 12, § 95(3); *Weathers v. Fulgenzi*, 884 P.2d 538, 541 (Okla. 1994).

The statute of limitations on Plaintiff's fraud claim expired, at the latest in April 1995, if not March 1989. As noted below in section V.B., Plaintiff alleges that Defendants committed fraud by representing to him that their sole objective was to foreclose on the UWECO Note in a commercially reasonable manner, when they really wanted to discredit his father and force him to resign. Plaintiff also alleges that Defendants committed fraud by representing to the Earles that it had authority to settle Borum's claims under the UWECO Note. All of these alleged misrepresentations occurred prior to the UWECO Settlement on February 26, 1987. Furthermore, Plaintiff, with reasonable diligence, could easily have discovered the truth as late as March 6, 1987, when he signed the Ratification Agreement, which contained information regarding the Bank's allegedly unreasonable methods for collecting on Borum's collateral. Even if this were not sufficient to put Plaintiff on notice, once his father resigned from the Bank's board of directors (and Defendants' alleged scheme

[5]The discovery rule tolls the statute of limitations until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury. *See McVay v. Rollings Constr., Inc.*, 820 P.2d 1331, 1332 n.1 (Okla. 1991); *Brueck v. Krings*, 638 P.2d 904, 908 (Kan. 1982). This knowledge of the injury consists of the fact of the injury, not necessarily its extent. *See Brueck*, 638 P.2d at 908.

was complete) on April 27, 1993, Borum could with reasonable diligence have determined not only how the Bank jeopardized his collateral but why.

C. Duty of Good Faith and Fair Dealing

A two-year statute of limitations, calculated from the date on which Plaintiff, with reasonable diligence could have discovered the breach, applies to Plaintiff's duty of good faith and fair dealing claim. Under Oklahoma law, a breach of the duty of good faith and fair dealing is considered a tort and is subject to a two-year limitation. *See Lewis v. Farmers Ins. Co.*, 681 P.2d 67, 70 (Okla. 1983); Okla. Stat. tit. 12, § 95(3). Kansas also applies a two-year limitations period, subject to the discovery rule. *See* Kan. Stat. Ann. tit. 60-513(a)(4), (b).

The statute of limitations on Plaintiff's duty of good faith and fair dealing claim expired, at the latest, by April 1997, if not March 1989. Plaintiffs' claims of breach of duty of good faith and fair dealing arise from Defendants' failure properly to collect on Plaintiff's collateral in order to discredit Plaintiff's father. Plaintiff also argues that Defendants unilaterally sued UWECO, did nothing to collect on the judgment but rather entered the Settlement Agreement, released the Earles' personal guarantees, and did not file or otherwise notify the purchasers of the assignments or division orders. Again Plaintiff reasonably could have ascertained these facts when he signed the Ratification Agreement on March 6, 1987. Defendants also put forth evidence of several facts indicating that Plaintiff had even more opportunities to learn these facts, if not actual knowledge. For example, in the spring of 1995, Borum and his father received documents from the bank, including the unfiled division

orders for the New Mexico leases conveyed in the UWECO Settlement Agreement. Moreover, Plaintiff talked to an attorney, who, from April to June 1995, sent letters to various persons regarding Randall and Troy Borum's interests in these unfiled division orders. Therefore, even if the statute of limitations did not expire in March 1989, it certainly expired by April 1997.

D. Breach of Contract

A five-year statute of limitations, calculated from the date on which Plaintiff had a legal right to sue, applies to Plaintiff's contract claim. Under Kansas law, the statute of limitations is five years from the point where Defendants allegedly breached the contract, regardless of when Plaintiff discovered the breach or injury. *See* Kan. Stat. Ann. § 60-511(1); *Pizel v. Zuspann*, 795 P.2d 42, 54, *modified on other grounds*, 803 P.2d 205 (Kan. 1990); *Graphic Tech., Inc. v. Pitney Bowes, Inc.*, 968 F. Supp. 602, 606 (D. Kan. 1997). Oklahoma law provides a later bar on Plaintiff's claim, because it limits the action to within five years of the date that the breach of contract action accrues. *See* Okla. Stat. tit. 12, § 95(1). Such an accrual occurs when Plaintiff could first have maintained the cause of action to conclusion, that is when Plaintiff had a legal right to sue. *See McCain v. Combined Communications Corp. of Oklahoma, Inc.*, 975 P.2d 865, 867 (Okla. 1998); *Dataq, Inc. v. Tokheim Corp.*, 736 F.2d 601, 603 (10th Cir. 1984).

The statute of limitations on Plaintiff's contract claim expired, at the latest, in March 1992. Plaintiff's complaint alleges that Defendants breached their contract with him by not

informing him of his default and by failing to use reasonable efforts to collect on his collateral. Plaintiff's response to Defendants' motion for summary judgment adds nothing further. As noted above, at the very latest, Plaintiff could have reasonably ascertained that Defendants had released the Earles and entered the UWECO Settlement Agreement by the day he signed the Ratification Agreement, March 6, 1987. He had five years from this date in which he could file suit and failed to do so. As the Tenth Circuit has noted, Oklahoma's statute of limitations "is intended to run against those who are neglectful of their rights and fail to use reasonable and proper diligence in enforcing them." *Dataq*, 736 F.2d at 603. The Court finds that Plaintiff's claim for breach of contract is barred by the statute of limitations.

E. Intentional and/or Negligent Infliction of Emotional Distress

A two-year statute of limitations, calculated from the date on which Plaintiff, with reasonable diligence could have discovered the injury, applies to Plaintiff's infliction of emotional distress claims. Negligent and intentional infliction of emotional distress claims are torts in Oklahoma and subject to a two-year limitation. *See Lockhart v. Loosen*, 943 P.2d 1074, 1081 (Okla. 1997) (negligent infliction of emotional distress is not an independent tort but rather is the tort of negligence); *Chandler v. Denton*, 741 P.2d 855, 867 n.35 (Okla. 1987) (intentional infliction of emotional distress is an independent tort); Okla. Stat. tit. 12, § 95(3). These claims also have a two-year limitation, subject to the discovery rule, in Kansas. *See* Kan. Stat. Ann. tit. 60-513(a)(4).

The statute of limitations on Plaintiff's infliction of emotional distress claims expired, at the latest, by April 1997, if not March 1989. Plaintiff merely incorporates the allegations made in his other claims in support of his infliction of emotional distress claims. As noted above, Plaintiff could, with reasonable diligence, have discovered the injury by March 6, 1987, when he signed the ratification agreement, or April 1995, when the letters regarding the unfiled division orders were sent.

F. Tolling of the Statute of Limitations

The statute of limitations applicable to Plaintiff's claims have not been tolled. As noted in the discussions of each claim above, Plaintiff's ability to discover the fraud, breach of contract, or tort injuries negates any attempt to toll. As part of a general tolling argument, however, Plaintiff additionally asserts that he had no knowledge of the suit against UWECO and the Earles, the resulting judgment, the UWECO Settlement Agreement, the release of the Earles under that Agreement, and the proceeds of that Agreement. Plaintiff *could* have known of these events had he exercised reasonable diligence. On July 16, 1986, Plaintiff signed the Settlement Agreement, which required the Bank to "file a legal action in Oklahoma County, Oklahoma District Court for the collection of the UWECO NOTE" and authorized the Bank to "in its sole discretion, pursue said litigation to settlement or judgment and apply the net proceeds received . . . as an offset against the indebtedness owed to BANK

by BORUM by virtue of the BORUM NOTE."[6] Although Plaintiff asserts that he did not read this agreement before signing it, he certainly, with reasonable diligence, could have read the Settlement Agreement and discovered that the Bank intended to sue UWECO and the Earles. Borum also signed the Ratification Agreement on March 6, 1987. The Ratification Agreement stated that the Settlement Agreement and the UWECO Settlement Agreement were attached to it. In addition, the Ratification Agreement stated that "the Bank, UWECO and certain members of the Earles family have executed a certain Settlement Agreement"; that Borum "ratifies, confirms, and approves all of the terms contained in the Settlement Agreement"; that the UWECO Settlement Agreement "was contemplated by the terms of the [Settlement Agreement], and that all cash proceeds generated pursuant to the terms of the Settlement Agreement and paid to the Bank will be applied against the indebtedness owing to the Bank by Borum previously evidenced by the Borum Note"; that the Bank would renew "the Borum Note" by Notes 82-85; that Borum would remain liable on these loans; and that the Bank could sue Borum if he defaulted on the renewed notes. Borum asserts that he did not read the Ratification Agreement and that it contained no attachments. However, with reasonable diligence, he could have read the agreement and commenced a course of inquiry

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[6]The Settlement Agreement defines "BORUM NOTE" as a promissory note for $190,482.13, executed on *March* 17, 1984, to which Borum assigned the UWECO Note as collateral, and which was extended on April 11, 1985, and had a principal amount of $117,066.00 plus interest due on March 25, 1986 that Borum had failed to pay. As noted above, this description matches that of Note 76, which was for $190,482.13, executed on *May* 17, 1984, had assigned to it the UWECO Note, and was renewed by Note 79, dated April 11, 1985, which had a principal balance of $117,066.00 and was due on March 25, 1986. It is interesting to note that Plaintiff does not similarly dispute his assignment of the UWECO Note on May 17, 1984, which is also misdated in the Settlement Agreement at March 17, 1984.

leading to a discovery that the Bank had obtained a judgment against UWECO and the Earles, had settled that judgment, and the terms of the UWECO Settlement Agreement. At that point, then, Plaintiff, with reasonable diligence could have discovered the injuries of which he now complains.

IV. Choice of Law – Contracts

As with statutes of limitations, the Court applies the choice of law rules of the forum state, in this case, Oklahoma. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 619 (10th Cir. 1998). In contracts cases, Oklahoma applies the lex loci contractus test, that is Oklahoma will apply the law of the state where the contract is made. *See Bohannan v. Allstate Ins. Co.*, 820 P.2d 787, 795, 797 (Okla. 1991); *see also Federal Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 802 (10th Cir. 1998) (applying this test). The parties entered this contract in Kansas; therefore Kansas law governs Plaintiff's contract claim.

As noted above, Plaintiff alleges that Defendants breached their contract with him by not informing him of his default and by failing to use reasonable efforts to collect on his collateral. Plaintiff has failed to go beyond the pleadings and identify specific facts requiring this case be submitted to the jury. Plaintiff does not point to any language of Note 76/79 that requires these actions by Defendants. Furthermore, Plaintiff signed the Settlement Agreement which states that Note 76/79 was in default and authorizing the Bank to exercise its discretion in pursuing litigation on the UWECO Note to settlement or judgment. Plaintiff argues that he did not read this agreement before signing it and that it is invalid as it is based

on a nonexistent note. As noted above, the Settlement Agreement is based on a note that is attached as an exhibit to Plaintiff's response and that no party claims is nonexistent, namely Note 76/79. Therefore, Plaintiff's argument fails in its most basic sense. Presumably, Plaintiff is not asserting that the Bank breached the Settlement Agreement, a contract he argues is invalid. The Settlement Agreement is evidence, however, that Defendants did not breach any alleged agreement requiring them to inform Plaintiff of his default, as it does just that. This Agreement also provides evidence that the Bank was authorized to take the actions it took to collect on the UWECO Note. Finally the Ratification Agreement further demonstrates Plaintiff's ratification of the Bank's authority to take the specific action it took in the UWECO Settlement Agreement. Although he claims not to have read the Ratification Agreement, Plaintiff signed it and acknowledged it before a notary public. Plaintiff also asserts that it contained no attachments. Even so, it clearly referred to the attachments and Plaintiff's ratification of the Settlement Agreement. *Cf. Southwest Nat'l Bank v. Simpson & Son, Inc.*, 799 P.2d 512, 518-19 (Kan. Ct. App. 1990) (finding that contract incorporating document by reference included that document even if it was not attached).

V. Choice of Law – Torts

Oklahoma applies the most significant relationship test of section 145 of the Restatement (Second) of Torts to determine which state's law governs a torts claim. *See Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974). Under this test, the Court considers the following factors, according to their relative importance: (1) the place where the injury

occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties occurred. *See Brickner*, 525 P.2d at 637.

Applying these factors, the Court finds that Kansas law applies to Plaintiff's tort claims. Plaintiff lived in Kansas every year but one from 1980 to 1995, during which time Plaintiff suffered much of the injuries allegedly caused by Defendants' fraud, breach of good faith and fair dealing, and infliction of emotional distress. The conduct causing those injuries occurred both in Kansas and Oklahoma. The Bank's efforts to foreclose and collect on the UWECO Note primarily occurred in Oklahoma. However, the agreements between Borum and the Bank occurred in Kansas, as did any concealment of information. Moreover, any conspiracy to use Plaintiff's loan situation to further a personal vendetta against his father occurred in Kansas. The parties are from both Kansas and Oklahoma. The Bank and CBS Bancorp, Inc. are incorporated and have their primary place of business in Kansas. Plaintiff now resides in Oklahoma, having moved here in 1995. Finally, the relationship between the parties occurred in Kansas. As Plaintiff notes in his complaint, he

> was a long-time loyal customer of the [Defendants]. The Plaintiff was introduced to and began business with the Bank because his father, Mr. Troy Borum, was a Director of the Bank. As part of his business dealings with the Bank, the Plaintiff made loans with the Bank.

(Compl. ¶ 6.) Applying these factors to this case, the Court finds that Kansas has the most significant relationship to Plaintiff's tort claims.

A. Statute of Repose

Kansas' statute of repose, Kan. Stat. Ann. § 60-513(b), is a substantive rule of law, *see Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 967 (Kan. 1992), and therefore applies in this case. Kansas' statute of repose provides that, "in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action." Kan. Stat. Ann. tit. 60-513(b). Plaintiff's fraud, breach of duty of good faith and fair dealing, and intentional infliction of emotional distress claims are covered by this statute. *See id.* § 60-513(a)(3)-(4).

B. Fraud

In his complaint, Plaintiff alleges that Defendants committed actual and constructive fraud by representing to him that their sole objective was to collect the money he owed them by foreclosing on the UWECO Note in a commercially reasonable manner, when their motives were something quite different. Plaintiff alleges that Defendants did not reasonably try to collect on the UWECO Note and that their primary goal was to force his father to resign from the Bank's board of directors. In his response to Defendants' motion for summary judgment, Plaintiff also alleges that the Bank misrepresented to the Earles that it had authority to negotiate a settlement on his behalf. Plaintiff continues,

> The Bank made a material representation believing that it would enable the Bank to quickly enter into a settlement agreement that the Bank desired. It did. Thus, the Bank is guilty of actual fraud. Even if the Bank did not intentionally misrepresent to Mr. Earles that it had authority to grant released [sic] to the Earles on behalf of Randy Borum, the Bank is still guilty of constructive fraud.

(Pl.'s Resp. at 21.) All of these alleged misrepresentations occurred prior to the UWECO Settlement on February 26, 1987. As the acts giving rise to Plaintiff's fraud action occurred more than 10 years prior the filing of this suit on June 18, 1998, this claim is barred by Kansas' statute of repose. Because this claim is both procedurally (statute of limitations) and substantively (statute of repose) barred, the Court will not address Defendants remaining arguments that Plaintiff has failed to establish the elements of fraud.

C. Duty of Good Faith and Fair Dealing

Plaintiffs claims of breach of duty of good faith and fair dealing are outlined in section III.C, *supra*. Again the acts alleged predate or occur simultaneously to the UWECO Settlement Agreement of February 26, 1987. As such, this claim is barred by Kansas' statute of repose. As with Plaintiff's fraud claim, the Court will not address Defendants' additional argument that it did not breach its duty of good faith and fair dealing.

D. Intentional/Negligent Infliction of Emotional Distress

Plaintiff's complaint incorporates the acts alleged in his other causes of action as the basis for his intentional and/or negligent infliction of emotional distress claims. In his response to Defendants' motion for summary judgment, Plaintiff does not articulate any

other acts that resulted in his distress, referring only to the Bank's "wrongful conduct in this case." Again, as noted with Plaintiff's fraud and good faith and fair dealing claims, all the alleged acts occurred no later than February 26, 1987. As such, this claim, too, is barred by Kansas' statute of repose.

Regardless of Kansas' statute of repose, Defendants are entitled to judgment as a matter of law as to Plaintiff's negligent and intentional infliction of emotional distress claims. Defendants have put forth uncontroverted facts defeating both claims, and Plaintiff has failed to identify specific facts demonstrating an issue to be tried by the jury.

Plaintiff has not established a negligent infliction of emotional distress claim. In order to sustain this claim, Plaintiff must establish that Defendants' conduct was accompanied by, or resulted in, immediate physical injury. *See Hoard v. Shawnee Mission Med. Ctr.*, 662 P.2d 1214, 1219-20 (Kan. 1983); *Reynolds v. Highland Manor, Inc.*, 954 P.2d 11, 13 (Kan. Ct. App. 1998). Defendants have put forth Plaintiff's deposition testimony, in which he says, "I haven't been to a doctor in 13 years. I am proud of it." Plaintiff has failed to put forth any contrary evidence creating a material issue of fact.

Plaintiff similarly has not established an intentional infliction of emotional distress claim. The four elements of this cause of action are as follows: (1) the conduct of the defendant was intentional or in reckless disregard of plaintiff; (2) the conduct was extreme and outrageous; (3) the conduct caused plaintiff's mental distress; and (4) this mental distress was extreme and severe. *See Burgess v. Perdue*, 721 P.2d 239, 242 (Kan. 1986). Before

allowing the case to go to the jury, the Court must determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery and whether the emotional distress suffered by plaintiff was of such an extreme degree that no reasonable person should be expected to endure it. *See id.* Plaintiff has failed to identify specific facts supporting either factor. Defendants, on the other hand, have demonstrated facts disproving both. Most damaging is their uncontroverted evidence that Plaintiff suffered absolutely no emotional distress. Defendants have submitted Plaintiff's own deposition testimony that he has never been treated for any medical problems or substance abuse, that he has never been under the care of a psychologist or licensed therapist, and finally his proud assertion that he has not seen a doctor in over a decade.

VI. Conclusion

Defendants are entitled to summary judgment on all of Plaintiffs claims. All four claims are barred by the statute of limitations. Kansas' statute of repose bars Plaintiff's claims for fraud, breach of duty of good faith and fair dealing, and infliction of emotional distress. Plaintiff's contract and infliction of emotional distress claims further fail on other substantive grounds.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment (# 97) is GRANTED. Defendants' counterclaim remains pending.

ORDERED THIS 17th DAY OF DECEMBER, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 21 1999

BRIAN SCOTT DANIELS,

Petitioner,

vs.

H. N. "SONNY" SCOTT,

Respondent.

Case No. 97-CV-463-K

FILED
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a 28 U.S.C. § 2254 petition for writ of habeas corpus. Petitioner appears *pro se*. Before the Court is Petitioner's "motion to strike" (Docket #8) filed in this matter on December 16, 1999. In his motion, Petitioner states that he "no longer has the desire to continue the above captioned case" and that "it would not be in the best interest of justice to continue this [action]." Petitioner requests that the Court "dismiss case no. CIV-239-B[1] with prejudice, granting this motion to strike." Based on these representations, the Court liberally construes Petitioner's "motion to strike" as a motion for voluntary dismissal as provided by Fed. R. Civ. P. 41(a).

Pursuant to Fed. R. Civ. P. 41(a)(2), the Court finds Petitioner's motion to dismiss his § 2254 petition for writ of habeas corpus should be granted and this action should be dismissed.

[1]Petitioner originally filed this action in the United States District Court for the Eastern District of Oklahoma where it was assigned Case No. CIV-97-239-B. Upon transfer to this Court, the case was assigned Case No. 97-CV-463-K.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's "motion to strike" (#8), construed as a Rule 41(a) motion for voluntary dismissal, is **granted.**

2. This action is **dismissed.**

2. This Order constitutes a final order terminating this action.

SO ORDERED THIS 17 day of December, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 21 1999

EVA L. MOODY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 97-CV-79-K**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

F I L E D
DEC 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On October 6, 1998, the Court granted Defendant's motion for summary judgment and on October 13, 1998, entered judgment against Plaintiff and for Defendant. On appeal, the Tenth Circuit has vacated this judgment, finding that the circumstances require dismissal without prejudice for lack of subject matter jurisdiction.

IT IS THEREFORE ORDERED that the claims of Plaintiff Eva L. Moody against Defendant United States of America are DISMISSED WITHOUT PREJUDICE.

ORDERED THIS 17 DAY OF DECEMBER, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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